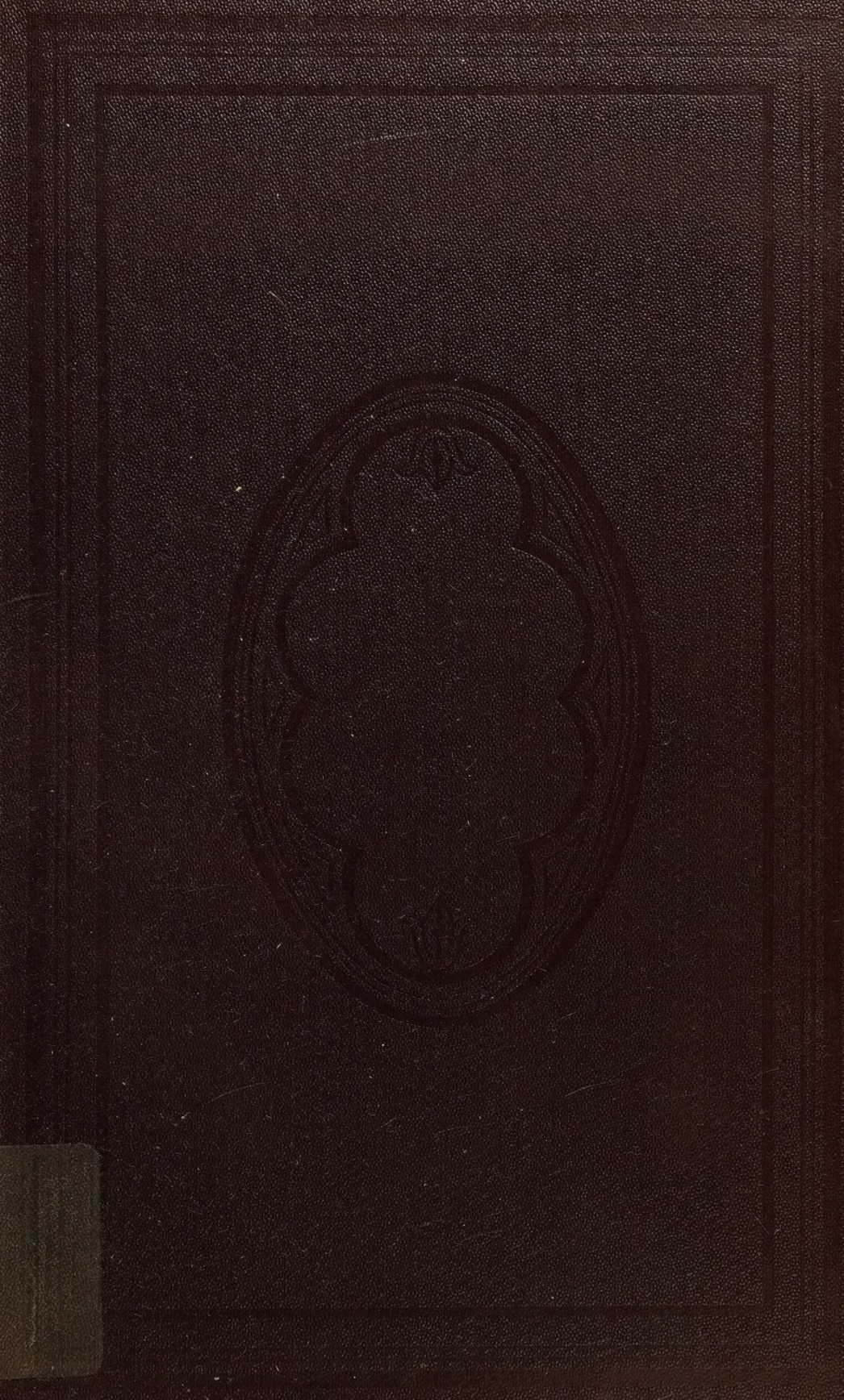

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THE COMMONWEALTH OF MASSACHUSETTS

Commission to Compile Information and Data

FOR THE USE OF THE

Constitutional Convention

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BOSTON

The Commission

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LAWRENCE B. EVANS, vice chairman
ROGER SHERMAN HOAR

HENRY WARD BIRD, secretary

BULLETIN No. 17

APPROPRIATIONS FOR SECTARIAN AND PRIVATE PURPOSES

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APPROPRIATIONS FOR SECTARIAN AND PRIVATE PURPOSES.

I. The Relation of Church and State in America.

Throughout the colonial period of American history there was in most of the colonies a close connection between church and state. There were several reasons why this should be both natural and inevitable. In the first place it was the prevailing system in Europe. The immigrants who came to America established here a relation between the secular and ecclesiastical powers similar to that with which they had been familiar at home. The absolute separation of church and state — a principle with which America is now identified — was one not widely supported prior to the American Revolution. In the second place, several of the American colonies were either established by churches or by groups of men so closely associated with certain religious bodies as to lead to the same practical result. Massachusetts owes its origin to the desire of the Congregational churches to establish a commonwealth in which they could worship God according to the dictates of their own consciences, without however extending a similar privilege to those who differed from them. Under the charter granted to Lord Baltimore and the group of Catholics who founded Maryland, a similar result was possible, but was prevented by the liberal statesmanship of the Lord Proprietor. In Pennsylvania the traditional attitude of the Quakers towards the adherents of other churches sufficiently assured the establishment of a policy of tolerance.

So long as each colony remained of one religious faith, or so long as one faith retained a decided predominance, the close connection between church and state gave rise to little practical difficulty. But in the seventeenth century, new elements began to be introduced. Diverse races which had before been

represented by numbers so inconsiderable as to be negligible now began to appear in an increasing volume. Hence laws and practices which had been applied without difficulty when unity of religious sentiment prevailed now became unworkable because that unity of sentiment had disappeared.

Coincident with the introduction of the new racial and religious elements which made the continued connection of church and state increasingly difficult there was a more and more widespread acceptance of the principle that the church and the state should be kept entirely distinct. This was in harmony with the prevailing tendency, as manifested in the expanding bills of rights of our early State constitutions, to enlarge that field of the individual's activity within which it was not considered to be legitimate for the State to interfere. Just as family rights, freedom of choice of a profession, freedom of contract and freedom of political action were guaranteed to the individual against encroachment by the government, so likewise his freedom in matters of religion came to be equally entitled to protection. The practical difficulty of acting upon the contrary principle in communities made up of diverse religious elements hastened the universal acceptance in all parts of America of the maxim that in matters of religious belief the individual should not be subject to public control.

With the growth of the feeling that there should be no connection between church and state, there has also been a change in the conception of the proper sphere which each should occupy. Several activities which for hundreds of years had been in the hands of ecclesiastical bodies were taken over by the state and treated as secular in their nature. The most important of these activities had to do with educational or humanitarian institutions.

Education had for centuries been regarded as peculiarly a function of the church. In fact in the disorganization which prevailed in Europe while the new kingdoms were growing up on the ruins of the Roman Empire there was no other authority to which men could look for enlightenment. The need of supplying training for its priests, who in turn should become the teachers of their successors, further stimulated the educational efforts of the church. As a result, the first schools established

in America all owed their origin to some branch of the church. The oldest school in the thirteen English colonies was that established in 1633 by the Dutch Reformed Church in New Amsterdam. This was followed by the Boston Latin School in 1635 or 1636. Earlier than either however were the schools established by the Franciscans in Florida and New Mexico.

If elementary education was to remain in the hands of schools established and controlled by the various churches, one of three results must follow. Either every church must maintain a school for its own children, or the children must attend a school of some other church, or they must remain without education. In many communities there were religious bodies which were not sufficiently strong in numbers and in property to maintain schools of their own. The children of families belonging to such churches must either attend schools where they would be subjected to religious teaching which their parents did not approve or go without formal training. This dilemma was removed by the establishment of the free public school.

Early in the nineteenth century, the country was swept by a wave of democracy which resulted in greatly extending the suffrage and in bringing practically all branches of the government under popular control. This movement was accompanied by the belief that the success of democracy depended primarily upon popular education, and hence that the state itself, as a means of self-protection, must create and maintain suitable schools. The religious and moral aims of education were not overlooked and were sometimes expressly set forth in the State constitutions. The statement in the Ordinance of 1787 for the government of the Northwest Territory, "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged," has been incorporated in the organic law of several States. Many of them express in some form the duty of the State to provide for education, and contain mandatory provisions as to the duty of the legislature to establish a suitable system of schools. So thoroughly has the conception of education as a secular function been accepted that in many States the former dependence of society upon the church for mental training has been almost forgotten.

In the last hundred years there has been a great change in the view taken as to the duty of the state in matters of philanthropy. As in the field of education so also in the field of humanitarian endeavor, it was the church which was long the most active factor. In the care of the poor and helpless, in ministering to the sick, in the maintenance of institutions for those who need assistance and protection, the church in all its branches is more active to-day than ever before. But the state is not a passive spectator, and through its own agents and by means of public institutions it seeks to relieve the wants of its people who are in distress. Every State in the Union has made some sort of provision for the maintenance of charitable and correctional institutions in which it seeks to do the work which was formerly thought to be possible only when actuated by a religious motive and when under the control of an ecclesiastical organization.

As a result of this twofold movement, — one toward the complete separation of church and state, and the other toward the assumption by the public of educational and philanthropic activities which had long been in the hands of the church, — provisions have been inserted in many State constitutions establishing the principle of liberty in religion as a part of the fundamental law, and, as incidental thereto, regulating the use of the public funds for institutions, particularly educational institutions, which are under sectarian or private control. These States fall into the following groups: —

1. Those which expressly forbid the use of public funds for institutions (sometimes schools only are specified) which are under sectarian control. These States, thirty-three in number, are Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington and Wyoming.

2. Those which seem to intend to prevent the appropriation of public money to sectarian schools but which employ language in their Constitutions the meaning of which is not always clear. These States, thirteen in number, are Arkansas, Connecticut,

Indiana, Iowa, Maine, Michigan, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, West Virginia and Wisconsin.

3. Those which do not confine their prohibition to institutions under sectarian control, but forbid appropriations of public money to all institutions not under public control. These States, six in number, are Alabama (except by a vote of two-thirds of all members elected to each house), Colorado, Louisiana (schools only), Montana, New Mexico (with exceptions) and Wyoming. All these States also appear in Group 1.[1]

II. The Relation of Church and State in Massachusetts.

The close connection between church and state in Massachusetts, which began with the earliest settlement, is reflected in the laws regarding taxation. In 1638 it was enacted by the General Court that "every such inhabitant who shall not volentarily contribute, pportionably to his ability, with other freemen of the same towne, to all comon charges, as well for upholding the ordinances in the churches as otherwise, shallbee compelled thereto by assessment & distres to bee levied by the cunstable, or other officer of the towne as in other cases."[2] Six years later, in 1644, the Commissioners of the New England Colonies assembled at Hartford sent the following recommendation to the colonial legislatures of New England:

> That those who are taught in the word in the seũall plantacõns be called togcther, that euery man voluntaryly set downe what he is willing to allow to that end & use. And if any man refuse to pay a meete pporcõn, that then hee be rated by authoryty in some just & equall way. And if after this any man withhold or delay due payment, the ciuill power be exercised as in other just debts.[3]

It is obvious that such a method of compelling the support of the church would create antagonism whenever a dissenting minority appeared with sufficient strength to assert itself. The dominant Congregationalists realized this and sought to preserve peace and harmony by the banishment of their oppo-

[1] For constitutional provisions see Appendix A.

[2] *Records of the Governor and Company of the Massachusetts Bay in New England*, I., 240-241.

[3] *Records of the Colony of New Plymouth in New England*, I., 20.

nents. The most illustrious victim of this policy was Roger Williams. The immediate result of his banishment was the establishment for the first time in the history of Christendom of a civil community founded upon the principle of complete liberty in matters of religion. What had long been the vision of a few philosophers now became a concrete fact. The Puritan colony however continued its persecutions, and the pertinacious Quakers, who would neither conform nor submit to banishment, were subjected to the death penalty and several were hanged on Boston Common. Early in the eighteenth century, however, there began to be a recognition of the injustice of taxing men for the maintenance of a form of religion which they could not accept, and in consequence Baptists, Quakers, Methodists, Episcopalians, Presbyterians and Universalists who could prove their connection with their own religious societies were exempted from the payment of taxes for the support of the Congregationalists. In Boston, what was known as the voluntary system, whereby each society was allowed to enforce contributions from its proprietors of pews, had long been applied, and in 1754 this privilege was extended to any religious society in the colony which chose to ask for it.

The right to be exempt from taxation for the support of the Congregational Church upon proof of membership in some other church did not satisfy the dissenters, and in the midst of the Revolution, when the right of the Parliament to tax colonists who were not represented therein was denied, the Baptists, that sect "which throughout its entire history preached the gospel of love, abhorred and abstained from persecution, and pre-eminently maintained the rights of conscience,"[1] insisted that on the same principle men who were not Congregationalists should not be taxed for the support of that church even though they could not show membership in some other religious body. When the General Court in 1778 prepared a constitution for submission to the people, the Baptists endeavored to obtain the insertion in it of a declaration of rights by which they would be given the same legal standing as the Congregationalists. The failure to comply with this demand was one of the reasons for the rejection of the constitution by the people.

[1] Oscar S. Straus, *Roger Williams, the Pioneer of Religious Liberty*, 107.

In the Constitutional Convention of 1780 the contest was renewed, and the Baptists were able to obtain a considerable modification of the original proposals of the leaders of the Congregationalists. Article III of the Declaration of Rights declared in its original form that the Legislature had the right "and ought to provide at the expense of the subject, if necessary, a suitable support for the public worship of God." As a concession to the Baptists, this authority was withheld from the Legislature, which was merely empowered to require the towns to make provision for the public support of religion. In the towns where the Congregationalists were in a majority, this meant the support of the Congregational Church, but in the towns where the Baptists were in a majority, it was the Baptist Church that was supported by the public. The Baptists, however, were little satisfied with this arrangement, for it fell far short of that perfect liberty in matters of religion for which they had striven so long. Furthermore, the concession was of little practical advantage to them, since in most towns they were in a minority and were still subject to many of the old restrictions. In 1811 the Legislature came to the rescue and passed what came to be known as the "Religious Freedom Act", by which any one might transfer his membership from the Congregational Church to an Episcopal, Baptist, Methodist or Universalist society in the same town, and the taxes which he paid to the town treasurer for the maintenance of public worship must be transmitted by that official to the society to which the tax payer belonged. One instance is recorded in which fourteen law suits were required in order to compel a reluctant treasurer to pay over the sum of four dollars to a Baptist society, but even so the Act of 1811 represented a considerable gain.

In the Constitutional Convention of 1820 efforts were made to obtain the adoption of an amendment that would remove the grievances of the dissenters. A thorough-going amendment proposed by the Baptists was rejected by the close vote of 179 to 186. There was little opposition however to the adoption of a resolution annulling that clause of the Constitution which empowered the Legislature to enjoin on individuals an attendance upon public worship — a provision which was de-

clared to be inoperative and incapable of enforcement. The word "Christian" was substituted for the word "Protestant" in that section of the Declaration of Rights which provided for the maintenance of public teachers of religion, and the provisions of the act of 1811, whereby the tax payer could compel the application of his taxes to the support of that public teacher upon whose instruction he attended, were incorporated in the proposed amendment. Moderate however as these provisions were, all but the one relating to the enforcement of attendance upon public worship were strongly opposed in the Convention, and the entire amendment was rejected by the people by a vote of 19,547 to 11,065. The sentiment, however, in favor of greater liberality in matters of religion and of a relaxation of the control heretofore exercised by the secular power continued to grow, and resulted finally in the submission by the Legislature of a proposal which was adopted by the people in 1833 and became the Eleventh Amendment to the Constitution. This vested in the several religious societies the power to elect their teachers or pastors, and to raise money for their support and for the erection and maintenance of houses of worship. Its final clauses were as follows: —

> And all religious sects and denominations demeaning themselves peaceably and as good citizens of the Commonwealth, shall be equally under the protection of the law, and no subordination of any one sect or denomination to another shall ever be established by law.

III. Amendment XVIII.

1. The Adoption of the Amendment.

The appropriation of public money for the use of sectarian schools was an important subject of debate in the Constitutional Convention of 1853. On May 31 the Convention adopted the following resolution: —

> *Ordered*, That the Committee on the Encouragement of Literature be instructed to inquire into the expediency of so amending the Constitution that the School Fund belonging to the Commonwealth shall never be appropriated or applied to the support of any sectarian schools, or schools founded upon sectarian principles.[1]

[1] *Debates of the Massachusetts Convention, 1853*, I, 359.

In response to this request the Committee, on July 5, made the following report: —

Resolved, That it is expedient so to amend the Constitution as to provide that no public money in this Commonwealth whether accruing from funds or raised by taxation, shall ever be appropriated for the support of sectarian and denominational schools.[1]

In the course of the discussion on the following day, Isaac Parker, a professor in the Harvard Law School, offered the following substitute for the resolution of the Committee: —

Resolved, That the money raised by taxation in the towns and cities for the support of public schools, and all money which may be appropriated by the State for the support of such schools, shall be applied to no other schools than those which are under the order and superintendence of the town or city authorities according to law, in which the money is to be expended.[2]

In the discussions which followed, considerable attention was given to the meaning of the word "schools," and the opinion of the delegates who spoke upon the question was clear that the term "schools" did not include colleges and hence that the proposed amendment, if adopted, would not prevent public aid for sectarian colleges.

The debate was again renewed on July 27, when Mr. Parker offered another substitute for the resolution of the Committee: —

Resolved, That all moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended, in no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended, and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own schools.[3]

There was no opposition to the resolution in its amended form, and the Convention adopted it without any speeches having been made either for or against it. On the same day a

[1] *Debates of the Massachusetts Convention, 1853*, II, 483. [2] *Ibid.*, II, 546. [3] *Ibid.*, III, 472.

motion to reconsider the vote was made,[1] and this led on July 29 to the most extended discussion which the subject of sectarian appropriations received in that Convention.[2] The debate, however, was not upon a very high plane, and consisted largely of insinuations as to the motives actuating the various speakers. Ultimately reconsideration was refused by a vote of 87 to 183, and the amendment was submitted to the people in the form given above. Although they rejected it, as they did all the other proposals submitted by the Convention, yet this proposal received a larger vote than any other and was defeated by only 401 votes. This narrow margin made it natural for the Legislature to submit the question again to the people, which it did in 1855, when a resolution identical in its terms with that of Professor Parker was accepted by the people and is now Article XVIII of the Amendments.

2. The Interpretation of the Amendment,

The Eighteenth Amendment has been the subject of two important decisions by the Supreme Judicial Court and of one Opinion from the same learned body. In Merrick *v.* Inhabitants of Amherst (1866), 12 Allen, 500, certain taxpayers of the town of Amherst sought an injunction to restrain the town and its officers from issuing bonds or borrowing money for an agricultural college to be established therein by the Commonwealth. It was argued, *inter alia*, that the expenditure of public money for such a purpose was a violation of the Eighteenth Amendment. The court held that the contention was without merit and said, at page 508: —

> The phrases "public schools" and "common schools" have acquired under the legislation and practice of this State a well-settled signification. They are never applied to the higher seminaries of learning, such as incorporated academies and colleges. These, in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the "public or common schools" is, that the latter are supported by general taxation, that they are open to all free of expense, and that they are under the immediate control and superin-

[1] *Debates of the Massachusetts Convention, 1853*, III, 474.

[2] *Ibid.*, III, 613–626.

tendence of agents appointed by the voters of each town and city. . . . We should be slow to come to the conclusion that the amendment was designed to take from the Legislature the power which had always been exercised from the earliest periods of our history, of making grants of land and money to incorporated academies and colleges.

Three years later the court was again called upon to interpret the Eighteenth Amendment in the case of Jenkins *v.* Inhabitants of Andover (1869), 103 Mass. 94. This case grew out of a petition brought by taxpayers for an injunction restraining the use of public funds in aid of a sectarian school. A town meeting of the town of Andover had authorized the borrowing of a sum of money to be given to the Punchard Free Academy, located in that town, to aid in the restoration of a building destroyed by fire. By the terms of the will of its founder, the Academy was under the direction of a board of eight trustees, among whom must be the ministers of the three churches in the town, while the remaining five were elected by the voters of the town from among the members of the three churches. The Academy served the town as a public high school, but the town government as such had no control over it. For this reason the court held that no public money could be appropriated to its use. "The fact that it is not under the control of the town authorities," said the court, "is its objectionable feature, and constitutes the reason why moneys raised by taxation or appropriated by the Commonwealth for the support of common schools cannot be applied to its support."

On February 28, 1908, the House of Representatives requested the Attorney-General to give his opinion in writing upon the following question: —

Under the Constitution and laws of the Commonwealth can a state, county, city, town, village or other civil division use its property or credit, or any money raised by taxation or otherwise, or authorize either to be used, for the purpose of founding, maintaining or aiding by appropriation or in any other manner any church, religious denomination or religious society, or any institution, school, society or undertaking which is under sectarian or ecclesiastical control?

On April 28, the Attorney-General, Hon. Dana Malone, rendered an opinion in which he said: —

The question is a somewhat broad one, but for the purposes of this inquiry I assume that the Honorable House of Representatives in substance desires my opinion on the question whether or not public moneys raised by taxation may, under the constitutional provisions, be expended by the Commonwealth or by any county, city or town thereof for the purpose of founding, maintaining or otherwise aiding any church, religious denomination or religious society or any institution, school, society or undertaking which is under sectarian or ecclesiastical control. On this assumption I submit the following conclusions: —

The right to appropriate public funds for specific purposes is no more extensive than the power to levy taxes for such specific purposes. The power of taxation has been defined and limited by the Constitution of the Commonwealth. So article IV of section 1 of chapter 1, part second, declares that the purposes for which the power of taxation in its various forms may be exercised by the Legislature are "for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof." Article XI of section 1 of chapter 2 restricts the issuing of moneys from the treasury to purposes of "the necessary defence and support of the Commonwealth, and the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the General Court."

In Lowell *v.* Boston, 111 Mass. 454, 460, it is said that: —

> The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare.

And in Mead *v.* Acton 139 Mass. 341, 344, the court said: —

> The right to tax is the right to raise money by assessing the citizens for the support of the government and the use of the State. The term "taxation" imports the raising of money for public use, and excludes the raising of it for private uses.

Opinion of the Justices, 186 Mass. 604.

The question is in each case, therefore, whether or not the purpose for which money is to be appropriated and spent is a public purpose, or, in connection with the precise question under consideration, whether or not the establishment, maintenance or aid of a church, religious denomination or religious society or of any institution, school, society or undertaking which is under sectarian or ecclesiastical control may be a public purpose which would justify the appropriation and use of public money.

With respect to churches and religious societies or denominations in general, the question is disposed of by a consideration of the existing provisions of the constitution and of the history of their enactment. The

original provision of the constitution embodied in the bill of rights (art. 3d) expressly empowered the legislature to compel the several towns, parishes and other political divisions of the Commonwealth to provide for public worship, and failure so to do was punished in some cases even by indictment. See Commonwealth *v.* Waterbury, 5 Mass. 257. As a necessary consequence of this duty the towns and parishes of the Commonwealth were authorized to raise money by taxation for the purpose of maintaining and supporting "public Protestant teachers of piety, religion and morality" in all cases where such provision was not voluntarily made. St. 1799, c. 87. And fines and penalties were provided for the failure so to do. It remained for the constitutional amendment duly adopted in 1833 to put an end to taxation for the support of churches or religious societies. The final words of this amending article (Art. XI) of the articles of amendment are as follows: —

> and no subordination of any one sect or denomination to another shall ever be established by law.

It is true that the Commonwealth still aids churches or religious societies of every sect and denomination by a general exemption from taxation of their property (see R. L., c. 12, § 5, cl. 7); but I am constrained to conclude that in respect of particular religious societies or churches an appropriation of public moneys raised by taxation for their benefit would be unconstitutional and void, for the reason that such appropriation would not be for a public body but for an association of individuals (see Kingman *v.* Brockton, 153 Mass. 255), and might be objectionable for the reason that it effected a subordination of one sect or denomination to another, contrary to the final provision of Article XI of the amendments to the Constitution of the Commonwealth hereinbefore referred to.

In the case of schools, so far as such schools fall within the limits of the system of education required to be established and maintained by the cities and towns of the Commonwealth, the rule seems to be equally well established and definite. Article XVIII of the amendments to the Constitution is as follows: — [Here follows the text of the Amendment.]

The terms "public schools" and "common schools," as used in this amendment, have been repeatedly defined. So in Jenkins *v.* Andover, 103 Mass. 94, 99, the court said: —

> These are the schools to which the eighteenth article applies, — schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education, and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system. . . . This class of schools does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality.

In the case of all such schools an appropriation of public money to or for the benefit of any religious sect for the maintenance exclusively of its own school is expressly forbidden. See Jenkins *v.* Andover, above cited.

Upon the other hand, it has long been the custom of the Commonwealth to aid by grants of land, by immunity from taxation, and even by direct appropriation of money, the establishment and maintenance of colleges, technical schools and other institutions of higher learning. The distinction between an appropriation for public schools and for the institutions of higher learning has been pointed out in Merrick *v.* Amherst, 12 Allen, 500, 508, as follows: — [Here follows the passage cited *ante*, 14.]

The assistance granted the higher institutions of learning, therefore, is based upon the proposition that the constitutional provision did not apply to them and that the establishment and maintenance of such institutions is a public purpose for which the Constitution does not forbid the appropriation of money raised by taxation. Upon the other hand, a school, society or institution which is under direct sectarian or ecclesiastical control and was designed solely, or even principally, for the benefit of persons of that particular sect or denomination, and for no others, could not be deemed to be maintained for a public purpose which would warrant an appropriation of the public funds.

Replying to the specific question of the Honorable House of Representatives, the principles above described are in my opinion equally applicable to any institution, society or undertaking for which it is asked that public money be appropriated. I apprehend that the question in each case must be whether or not the purpose which it is sought to aid is a public purpose, and such question is to be determined upon the facts then presented.[1]

The meaning of Amendment XVIII again came before the Supreme Judicial Court in 1913, when the Legislature requested the opinion of the Justices on several questions of law, the second of which was as follows: —

Do the existing provisions of the Constitution of Massachusetts, and especially Article XVIII of the amendments thereto, adequately prohibit the appropriation by the Commonwealth or by any county or municipality of money raised by taxation for maintaining or aiding any church, religious denomination or religious society, or any institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control?

To this question the Justices replied: —

So far as the second question relates to the appropriation of money for schools the answer is simple. Article XVIII of the Amendments to the Constitution was adopted because of a deep-seated conviction of

[1] *House Journal for 1908*, 771; *House Documents, 1908*, No. 1467.

the imperative necessity of preserving the public school system in its integrity and of guarding it from attack or change by explicit mandate. Public schools never have been understood to include higher institutions of learning like colleges and universities. All moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words generally have been understood, must be disbursed exclusively for the support of such schools and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect. But there is no constitutional prohibition against appropriations for higher educational institutions, societies or undertakings under sectarian or ecclesiastical control. Merrick *v.* Amherst, 12 Allen, 500; Jenkins *v.* Andover, 103 Mass. 94.

So far as the second question relates to the appropriation of public money for aiding any church, religious denomination or religious society, it presents more difficulty. The Chief Justice and Justices Morton, Braley and DeCourcy are of opinion that such an appropriation is prohibited by the Constitution and its Amendments, while Justices Hammond, Loring and Sheldon incline to the opposite conclusion. It has been said repeatedly that answers given by the justices to questions propounded by the Legislature have not the binding force of decisions of the court, but are the opinions of the individual justices acting as constitutional advisers to a co-ordinate department of the government. The doctrine of *stare decisis* does not apply to them, but they are open to reconsideration and revision. Commonwealth *v.* Green, 12 Allen, 155, 164; Opinion of the Justices, 5 Met. 596, 597; Opinion of the Justices, 126 Mass. 557, 566. Whether under these circumstances the existing provisions of the Constitution "adequately prohibit" the appropriation of money raised by taxation for these purposes so that there is no "necessity for the adoption of an amendment" to this end, presents a legislative question rather than a question of law.[1]

3. Proposals of Further Amendment.

There has been considerable feeling in the State that the existing provisions of the Constitution are not sufficiently definite and comprehensive. In 1900 petitions in aid of the following proposed amendment were received by the Legislature: —

ARTICLE OF AMENDMENT.

No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the State or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used, for the purpose of founding, maintaining or aiding by appropriation, payment for services, expenses, or in any other manner, any church,

[1] Opinion of the Justices (1913), 214 Mass. 599, 601.

religious denomination or religious society, or any institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control.

This amendment, which is popularly known as the Anti-Sectarian Amendment, has been before the Legislature every year from 1900 to 1916 inclusive except the years 1905 and 1906. In every year except 1914 and 1915, the proposed amendment was either referred to the next General Court or the petitioners were given leave to withdraw. The first roll call on the amendment occurred in 1912, when reconsideration of the adoption of the committee's recommendation of leave to withdraw was refused by a vote of 16 to 170.[1]

On January 21, 1914, the same form of amendment was introduced on petition. On April 22 it came up in the House for a third reading. Mr. Lomasney of Boston moved that the resolve be amended by striking out all after the words "religious society," and inserting in place thereof the words "or any college, educational or other institution, school, infirmary, hospital or undertaking which is not a State, county, city or

[1] The vote was as follows:

Yeas: W. W. Baker, A. W. Bartlett, Sanford Bates, C. L. Carr, J. H. L. Coon, Joseph Craig, B. D. Gifford, F. P. Greenwood, J. A. Hart, C. T. Holt, W. R. Meins, A. H. Silvester, J. S. Smith, H. M. Storm, G. P. Webster, H. G. Wells. Total, 16.

Nays: Henry Achin, Jr., E. C. R. Bagley, J. H. Baker, John Ballantyne, J. F. Barry, F. D. Bartlett, W. A. L. Bazeley, J. V. Beal, H. C. Beaman, J. W. Bean, W. A. Bellamy, A. H. Bicknell, E. H. Bigelow, A. E. Bliss, C. M. Blodgett, William Booth, J. G. Brackett, J. H. Brennan, J. J. Brennan, J. P. Brennan, M. J. Brophy, D. J. Buckley, J. D. Burns, O. W. Butler, M. J. Carbary, J. J. Carmody, P. B. Carr, J. F. Cavanagh, A. B. Clark, W. P. Clark, J. H. Cogswell, S. I. Collins, J. D. Connors, L. M. Conwell, M. H. Cotter, C. H. Cox, J. J. Creed, Courtenay Crocker, C. A. Crowley, T. S. Cuff, J. A. Curtin, G. T. Daly, Thomas Davies, J. L. Donovan, G. P. Drury, W. S. Duncan, J. F. Dwyer, J. F. Eagan, H. M. Eames, G. W. W. Edson, C. W. Eldridge, G. H. Ellis, W. B. Fay, J. B. Fellows, Edward Fisher, Daniel Fitzpatrick, J. T. Flanagan, F. W. Ford, J. E. Fowle, Gerrett Geils, Jr., C. L. Gifford, W. H. Gifford, G. W. Gordon, Isaac Gordon, F. J. Grady, W. J. Graham, J. F. Griffin, B. F. Haines, E. M. Hall, C. W. Harding, L. F. Hardy, E. F. Harrington, E. R. Hathaway, T. R. Hawley, Martin Hays, M. A. Henebery, W. P. Hickey, F. M. Hill, C. W. Hobbs, Jr., H. W. Holbrook, Alexander Holmes, C. H. Howe, F. W. Hurlburt, J. M. Hurley, J. E. Kearns, M. S. Keenan, Michael Kelly, W. W. Kennard, L. R. Kiernan, W. S. Kinney, James Kittle, H. B. Knowles, F. X. LeBœuf, Joseph Leonard, W. J. Leslie, G. W. Libbey, E. F. Lilley, M. M. Lomasney, P. I. Lombard, W. J. Look, J. E. Lyman, J. P. Maguire, J. C. Mahoney, J. W. Martin, Jr., A. J. McCulloch, E. J. McDermott, E. E. McGrath, J. H. McInerney, S. B. McLeod, W. M. McMorrow, T. J. Meade, J. F. Meaney, John Mitchell, C. H. Morgan, Frank Mulveny, W. J. Murray, W. J. Naphen, A. N. Newhall, C. A. Norwood, C. R. O'Connell, F. D. O'Donnell, W. A. O'Hearn, J. H. O'Keefe, C. A. Orstrom, C. B. Packard, J. H. Parker, Jr., J. A. Parks, H. H. Parsons, N. B. Parsons, J. H. Pendergast, W. E. Piper, F. H. Pope, A. F. Priest, J. E. Quinn, G. F. Reardon, J. J. Reed, M. J. Reidy, L. O. Rieutord, J. L. Saltonstall, J. C. Sanborn, E. E. Sargent, Alexander Sedgwick, Benjamin Sharp, J. H. Sherburne, C. D. Smith, J. G. Stevens, W. L. Stone, B. F. Sullivan, W. H. Sullivan, W. J. Sullivan, E. A. Sweeney, D. W. Teehan, Alfred Tewksbury, H. E. Thompson, N. A. Tufts, E. W. Tyler, C. L. Underhill, J. R. Wallace, H. W. Warner, R. M. Washburn, T. W. White, I. E. Willetts, H. J. Winslow, E. A. Witt, Roger Wolcott, J. I. Wood, N. P. Wood, H. D. Wright, O. L. Wright. Total, 170.

town institution established by statute, ordinance or by-law of the State, county, city, town, village or other civil division."

Mr. Bates of Boston raised the point of order that the amendment was not germane to the subject-matter considered by the committee. The Speaker ruled as follows: —

The petition calls for an amendment of the Constitution prohibiting sectarian legislation and the support of sectarian institutions from public funds. Under the amendment, institutions which are not in any respect sectarian would be brought within the prohibition of the constitutional amendment. The object of the rule that "No motion or proposition on the subject different from that under consideration shall be admitted under color of amendment" is to prevent the passage of legislation of which interested parties have had no notice. A number of institutions in this Commonwealth would be affected by the proposed amendment. They have had no notice that legislation affecting them was pending and no opportunity to be heard. The amendment, therefore, comes within both the letter and spirit of the rule forbidding amendments and bills outside of the scope of the petition. The Chair, therefore, rules that the point of order is well taken.

On the main question the yeas and nays were ordered, at the request of Mr. Lomasney of Boston; and the roll having been called the House refused to order the resolve to a third reading. The vote was 87 yeas to 134 nays.[1]

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[1] The vote was as follows:

Yeas: E. S. Abbott, H. L. Andrews, O. E. Arkwell, W. M. Armstrong, C. N. Atwood, I. F. Batchelder, Sanford Bates, E. E. Belding, E. P. Bennett, E. H. Bigelow, E. C. Bodfish, H. E. Bothfeld, Arthur Bower, E. K. Bowser, A. J. Bradstreet, G. E. Briggs, Frederick Butler, A. G. Catheron, G. D. Chamberlain, C. A. Chandler, J. W. Churchill, S. I. Collins, D. H. Cook, C. H. Cox, H. E. Cummings, E. N. Dahlborg, C. R. Damon, A. M. Darling, Alfred Davenport, Samuel Davis, F. S. Delafield, W. H. Dolben, G. E. Dow, G. P. Drury, G. H. Ellis, G. W. Faulkner, F. B. Felton, A. N. Fessenden, E. G. Fosgate, H. E. Frost, F. P. Greenwood, H. P. Gurney, W. N. Hackett, B. F. Haines, John Halliwell, J. L. Harrop, J. F. Hatch, Jr., Albert Holway, J. B. Hull, Jr., F. W. Hurlburt, V. F. Jewett, W. W. Kennard, C. A. Kimball, Richard Knowles, J. O. Knox, C. A. LeGro, F. O. Lewis, F. E. Lincoln, S. L. Little, H. F. Long, W. J. Look, F. W. Lucke, J. M. Lyle, F. H. Magison, A. E. McCleary, G. F. Morse, Jr., A. N. Newhall, J. N. Osborne, H. B. Parker, Immanuel Pfeiffer, Jr., E. F. Phillips, W. H. Poole, W. F. Prime, E. J. Sandberg, H. H. Sears, Fitz-Henry Smith, Jr., J. S. Smith, R. M. Smith, W. O. Souther, Jr., J. F. Stone, J. G. Tilden, J. E. Tolman, N. A. Tufts, G. P. Webster, T. E. P. Wilson, Herbert Wing. H. D. Wright. Total, 87.

Nays: Henry Achin, Jr., T. J. Ahern, J. A. Anderson, J. J. Bacigalupo, J. T. Bagshaw, J. F. Barry, J. L. Barry, J. E. Beck, P. H. Boyle, J. W. Brennan, Vincent Brogna, D. J. Buckley, M. H. Burdick, F. H. Burke, F. W. Burke, J. F. Carman, W. E. Carney, Maurice Caro, Edward Carr, Peter Carr, A. A. Casassa, T. J. Casey, D. J. Chapman, E. E. Chapman, E. S. Cobb, James Coffey, T. C. Collins, W. L. Collins, T. J. Cooley, R. R. Costine, M. H. Cotter, J. J. Courtney, W. D. Cowls, W. N. Cronin, F. W. Cross, J. E. Cuddy, Jr., J. J. Cummings, P. J. Curley, G. E. Curran, R. W. Currier, J. A. Curtin, E. J. Dailey, John Doherty, J. F. Doherty, J. A. Donoghue, J. L. Donovan, T. E. Dowd, W. F. Doyle, F. B. Edgell, John Ennis, F. S. Farnsworth, J. T. Flanagan, M. R. Flynn, J. J. Gilbride, W. L. F. Gilman, T. A. Glennon, J. L. G. Glynn, A. G. Greaney, J. F. Griffin, E. M. Hall, B. F. Hanrahan, L. M. Harlow, E. F. Harrington, S. H. Har-

In 1915 the same resolve was again introduced on petition. The following proposal of amendment, which is popularly known as the Lomasney amendment, was also introduced on petition: —

ARTICLE OF AMENDMENT.

No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the State or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used for the purpose of founding, maintaining or aiding by appropriation, payment for services, expenses, or in any other manner any church, religious denomination, or religious society, or any college, educational or other institution, school, infirmary, hospital or undertaking, which is not a State, county, city or town institution established by statute, ordinance or by-law of the State, county, city, town, village or other civil division.

A motion to substitute the Lomasney amendment for the Anti-Sectarian amendment was rejected by a vote of 111 to 116, and the latter was then refused a third reading by a vote of 107 yeas to 115 nays.[1] At this session also the following pro-

rington, G. F. Hart, Martin Hays, T. A. Henry, W. E. Hickey, M. A. Higgins, J. J. Kelley, J. T. Kenney, M. B. Kenney, J. R. Kiggins, Joseph LaFlamme, C. S. Lawler, F. X. LeBœuf, M. M. Lomasney, J. J. Lydon, J. H. Lynch, H. J. Mahoney, J. C. Mahoney, D. C. Manning, F. A. Manning, G. E. Mansfield, J. W. Martin, Jr., O. T. Mason, J. S. McDonough, M. H. McGaughey, C. H. McGlue, M. F. McGrath, J. H. McInerney, E. F. McLaughlin, H. J. McLaughlin, P. J. McManus, W. M. McMorrow, John Mitchell, Frank Mulveny, D. A. Murphy, E. P. Murphy, J. J. Murphy, W. J. Naphen, K. L. Nash, T. A. Niland, J. T. O'Dowd, A. F. Ogden, Chauncey Pepin, J. E. Phelan, C. W. Proctor, H. L. Ray, J. J. Reilly, F. B. Rich, Robert Robinson, W. M. Robinson, W. F. Russell, J. D. Ryan, C. B. Sanborn, R. D. Sawyer, J. F. Sheehan, C. E. Stanwood, M. E. Streeter, D. F. Sullivan, J. F. Sullivan, L. R. Sullivan, M. T. Sullivan, P. F. Tague, J. J. Twohig, G. J. Wall, H. W. Warner, J. E. Warner, C. H. Waterman, C. H. Webster, T. W. White, H. A. Wilson, G. M. Worrall. Total, 134.

[1] The vote was as follows:

Yeas: E. S. Abbott, J. W. Allen, C. H. Annis, W. M. Armstrong, H. H. Atwood, S. H. Bailey, Edmund Baker, P. H. Ball, A. W. Barker, A. P. Beardsley, Joseph Belcher, Jacob Bitzer, T. W. Blanchard, A. E. Bliss, H. E. Bothfeld, Arthur Bower, F. J. Brown, A. E. Burr, J. F. Carman, A. G. Catheron, G. D. Chamberlain, A. M. Chandler, E. E. Chapman, J. W. Churchill, F. F. Clauss, A. W. Colburn, B. G. Collins, S. I. Collins, D. H. Cook, T. J. Cooley, B. H. Crosby, F. W. Cross, E. F. Davis, Samuel Davis, T. H. Day, W. A. Dodge, A. C. Dowse, G. P. Drury, C. A. Ericson, F. B. Felton, H. F. Field, H. C. Foster, H. E. Frost, C. B. Frothingham, A. T. Fuller, H. F. Furness, H. C. Gates, J. S. Gates, J. M. Gibbs, S. P. Graves, F. P. Greenwood, E. H. Hall, John Halliwell, J. L. Harrop, Albert Holway, J. B. Hull, C. N. James, V. F. Jewett, W. W. Kennard, R. T. Kent, Richard Knowles, J. O. Knox, A. F. Lamb, G. B. Leonard, F. O. Lewis, G. A. Lindberg, H. F. Long, F. H. Lucke, J. M. Lyle, F. E. Lyman, J. E. MacPherson, J. L. Mather, J. B. McLane, S. H. Mildram, W. E. Monk, G. F. Morse, Jr., A. N. Newhall, J. P. Nickerson, Francis Norwood, J. N. Osborne, J. C. Perry, J. H. Perry, Immanuel Pfeiffer, Jr., J. T. Potter, M. L. Quinn, W. C. Renne, S. B. Root, G. O. Russell, E. J. Sandberg, J. A. Saunders, A. M. Sinnott, FitzHenry Smith, Jr., J. S. Smith, R. M. Smith, W. O. Souther, Jr., C. E. Stanwood, J. F. Stone, M. E. Streeter, W. E. Tarbell, J. E. Tolman, S. W. Weare, Thomas Weston, Jr., H. L. White, E. H. Whitney, G. A. Whitney, H. C. Woodill, G. M. Worrall. Total, 107.

Nays: Henry Achin, Jr., J. T. Bagshaw, J. L. Barry, W. J. Barry, J. J. Benson, J. J. Brennan, T. H. Brennan, D. J. Buckley, George Bunting, F. W. Burke, F. E. Cady, M. J. Carbary, Maurice Caro, Peter Carr, A. A. Casassa, D. W. Casey, A. S. Clapp, James Coffey, M. H. Cotter, J. J.

posal of amendment was introduced and the petitioners were given leave to withdraw: —

ARTICLE OF AMENDMENT.

No money raised by taxation or derived from the public funds of any town, city, county, or of the State itself shall ever be appropriated for the support or maintenance of any institution either educational, charitable, or otherwise unless the land, buildings, equipment, and other property of such institution are owned and the institution itself is managed and controlled by the town, city, or county making such appropriation or by the State.

Nothing in this article shall be so construed as to prevent a town, city, county or the State from appropriating money in payment for services rendered by a privately controlled hospital, or as invalidating any contract or agreement already made between the Commonwealth and any existing institution.[1]

In 1916 both the Anti-Sectarian and the Lomasney amendments were again introduced and both were referred to the next General Court. In 1917 the Lomasney amendment was introduced and referred to the next General Court.

NOTE. — Since the preparation of the foregoing account the Constitutional Convention submitted to the people an amendment dealing with appropriations for private institutions, and it was adopted November 6, 1917. The text may be found *post*, 35.

Courtney, G. H. Creighton, W. N. Cronin, J. T. Crowley, P. J. Curley, G. E. Curran, E. J. Dailey, J. F. Doherty, P. J. Donaghue, W. J. Donahoe, J. J. Donahue, J. A. Donoghue, J. L. Donovan, T. E. Dowd, D. F. Duggan, F. B. Edgell, C. C. Emery, J. G. Faxon, M. R. Flynn, W. J. Foley, C. F. Garrity, T. J. Giblin, J. P. Good, E. F. Harrington, G. F. Hart, M. A. Higgins, J. J. Kearney, J. J. Kelley, T. R. Kelley, F. X. LeBœuf, J. N. Levins, E. E. Lincoln, M. M. Lomasney, J. H. Lynch, F. W. MacKenzie, J. P. Mahoney, M. F. Malone, F. A. Manning, F. A. Marcella, J. E. Maybury, J. F. McCarthy, C. H. McGlue, Joseph McGrath, E. F. McLaughlin, H. J. McLaughlin, W. M. McMorrow, M. J. McNamee, John Mitchell, J. L. Monahan, A. J. Moore, E. G. Morris, H. E. Mullen, T. B. Mulvehill, Frank Mulveny, D. A. Murphy, E. P. Murphy, J. J. Murphy, J. J. Murphy, D. W. Murray, P. E. Murray, Jr., K. L. Nash, E. H. Nutting, J. A. Oakhem, J. T. O'Dowd, A. F. Ogden, P. C. Paradis, J. H. Parker, Chauncey Pepin, E. H. Perry, J. E. Phelan, W. F. Prime, G. J. Rabouin, C. R. Read, D. F. Reardon, J. J. Reilly, Robert Robinson, W. M. Robinson, C. F. Rowley, W. F. Russell, J. D. Ryan, Alfred Santosuosso, R. D. Sawyer, C. B. Seagrave, J. F. Sheehan, J. H. Sherburne, M. J. Sherry, D. J. Sullivan, J. F. Sullivan, L. R. Sullivan, W. H. Sullivan, E. P. Talbot, G. J. Wall, J. E. Warner, G. B. Waterman, H. A. Wilson, W. E. Wolfe. Total, 115.

[1] *House Journal for 1915*, 120, 936; *House Documents for 1915*, No. 952.

Appendix A.

Constitutional Provisions concerning Appropriations for Sectarian Purposes.

Alabama, Art. IV, Sec. 73. No appropriation shall be made to any charitable or educational institution not under the absolute control of the State, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

Art. XII, Sec. 263. No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.

Arizona, Art. II, Sec. 12. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

Art. IX, Sec. 10. No tax shall be laid or appropriation of public money made in aid of any church or private or sectarian school or any public service corporation.

Art. XI, Sec. 7. No sectarian instruction shall be imparted in any school or State educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the State, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the State, or with the rights of others.

Art. XX, Sec. 7. Provision shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the State and be free from sectarian control, and said schools shall always be conducted in English.

Arkansas, Art. XIV, Sec. 2. No money or property belonging to the public school fund or to this State, for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs.

California, Art. IX, Sec. 8. No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction therein be permitted, directly or indirectly, in any of the common schools of this State.

California — Con.

Art. IV, Sec. 22. No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the Controller; and no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State; *provided*, that notwithstanding anything contained in this or any other section of this Constitution, the Legislature shall have the power to grant aid to the institutions conducted for the support and maintenance of minor orphans, or half-orphans, or abandoned children, or aged persons in indigent circumstances — such aid to be granted by a uniform rule and proportioned to the number of inmates of such respective institutions; *provided, further*, that the State shall have at any time the right to inquire into the management of such institution; *provided, further*, that whenever any county, or city and county, or city, or town, shall provide for the support of minor orphans, or half-orphans, or abandoned children, or aged persons in indigent circumstances, such county, city and county, city, or town shall be entitled to receive the same pro rata appropriations as may be granted to such institutions under church or other control. An accurate statement of the receipts and expenditures of public moneys shall be attached to and published with the laws at every regular session of the Legislature. . . . [The remainder of the section provides for the use of public funds for the support of the Panama-Pacific Exposition.]

Art. IV, Sec. 30. Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation, for any religious creed, church, or sectarian purpose, whatever; *provided*, that nothing in this section shall prevent the Legislature granting aid pursuant to section twenty-two of this article.

Colorado, Art. V, Sec. 34. No appropriation shall be made for charitable, industrial, educational or benevolent purposes, to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.

COLORADO — Con.

Art. IX, Sec. 7. Neither the General Assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

Art. IX, Sec. 8. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color.

CONNECTICUT, Art. VIII, Sec. 2. The fund called the School Fund shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public, or common schools throughout the State, and for the equal benefit of all the people thereof. The value and amount of said fund shall, as soon as practicable, be ascertained in such manner as the General Assembly may prescribe, published, and recorded in the Controller's office; and no law shall ever be made, authorizing said fund to be diverted to any other use than the encouragement and support of public, or common schools, among the several school societies, as justice and equity shall require.

DELAWARE, Art. X, Sec. 3. No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.

Art. X, Sec. 4. No part of the principal or income of the Public School Fund, now or hereafter existing, shall be used for any other purpose than the support of free public schools.

FLORIDA, Declaration of Rights, Sec. 6. No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution.

Florida — Con.

Art. XII, Sec. 4. The State School Fund, the interest of which shall be exclusively applied to the support and maintenance of public free schools, shall be derived from the following sources: . . .

Art. XII, Sec. 13. No law shall be enacted authorizing the diversion or the lending of any county or district school funds, or the appropriation of any part of the permanent or available school fund to any other than school purposes; nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.

Georgia, Art. I, Par. XIV. No money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect or denomination of religionists, or of any sectarian institution.

Idaho, Art. IX, Sec. 5. Neither the Legislature nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation or pay from any public fund or moneys whatever, anything in aid of any church or sectarian, or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation, to any church or for any sectarian or religious purpose.

Art. IX, Sec. 6. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

Illinois, Art. VIII, Sec. 3. Neither the General Assembly nor any county, city, town, township, school district or other public corporation shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation to any church or for any sectarian purpose.

INDIANA, Art. I, Sec. 6. No money shall be drawn from the treasury for the benefit of any religious or theological institution.

Art. VIII, Sec. 3. The principal of the Common School Fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.

IOWA, Art. IX, Part 2, Sec. 3. The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this State, for the support of schools, [and certain other funds] shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of common schools throughout the State.

KANSAS, Art. VI, Sec. 8. No religious sect or sects shall ever control any part of the common-school or University funds of the State.

KENTUCKY, Sec. 189. No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used, by or in aid of, any church, sectarian, or denominational school.

LOUISIANA, Art. 53. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship; nor shall any appropriation be made for private, charitable or benevolent purposes to any person or community; provided, this shall not apply to the Louisiana Hospital for [the] Insane of the State of Louisiana, at Pineville, the East Louisiana Hospital for the Insane, at Jackson, and Louisiana State School for the Deaf, and Louisiana State School for the Blind, the Louisiana Training Institute, and the charity hospitals and public charitable institutions conducted under State authority.

Art. 253. No funds raised for the support of the public schools of the State shall be appropriated to or used for the support of any private or sectarian schools.

MAINE, Art. VIII. No donation, grant or endowment shall at any time be made by the Legislature to any literary institution now established, or which may hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have the right to grant any further powers to alter, limit or restrain any of the powers vested in, any such literary institution, as shall be judged necessary to promote the best interests thereof.

Massachusetts, Amendment XLVI, Art. XVIII, Sec. 1. No law shall be passed prohibiting the free exercise of religion.

Sec. 2. All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Sec. 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

Sec. 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

Sec. 5. This amendment shall not take effect until the October first next succeeding its ratification and adoption by the people.

Michigan, Art. II, Sec. 3. Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the

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gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary: nor shall property belonging to the State be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

Minnesota, Art. I, Sec. 16. . . . nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

Art. VIII, Sec. 3. In no case shall . . . any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

Mississippi, Art. IV, Sec. 66. No law granting a donation, or gratuity, in favor of any person or object shall be enacted, except by the concurrence of two-thirds of each branch of the legislature, nor by any vote for a sectarian purpose or use.

Art. VIII, Sec. 208. No religious or other sect, or sects, shall ever control any part of the school or other educational funds of this State; nor shall any funds be appropriated toward the support of any sectarian school; or to any school that at the time of receiving such appropriation is not conducted as a free school.

Missouri, Art. II, Sec. 7. That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof as such; and that no preference shall be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship.

Art. XI, Sec. 11. Neither the General Assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever anything in aid of any religious creed, church or sectarian purpose; or to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning, controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any county, city, town or other municipal corporation, for any religious creed, church or sectarian purpose whatever.

Montana, Art. V, Sec. 35. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

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Art. XI, Sec. 8. Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporations shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever.

Art. XI, Sec. 9. No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student; nor shall attendance be required at any religious service whatever; nor shall any sectarian tenets be taught in any public educational institution of the State. . . .

NEBRASKA, Art. VIII, Sec. 11. No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes; nor shall the State accept any grant, conveyance, or bequest of money, lands or other property to be used for sectarian purposes.

NEVADA, Art. XI, Sec. 2. The Legislature shall provide for a uniform system of common schools by which a school shall be established and maintained in each school district at least six months in every year; and any school district neglecting to establish and maintain such a school, or which shall allow instruction of a sectarian character therein, may be deprived of its portion of the interest of the Public School Fund during such neglect or infraction.

Art. XI, Sec. 9. No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.

Art. XI, Sec. 10. No public funds of any kind or character whatever, State, county, or municipal, shall be used for sectarian purposes.

NEW HAMPSHIRE, Part II, Art. 82. No money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.

NEW JERSEY, Art. IV, Sec. VII. Par. 6. The fund for the support of free schools, . . . shall be securely invested and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the State; and it shall not be competent for the Legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretence whatever.

New Mexico, Art. IV, Sec. 31. No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the State, but the Legislature may, in its discretion, make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the Legislative Assembly of nineteen hundred and nine.

Art. XII, Sec. 3. The schools, colleges, universities and other educational institutions provided for by this Constitution shall forever remain under the exclusive control of the State, and no part of the proceeds arising from the sale or disposal of any lands granted to the State by Congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

Art. XII, Sec. 9. No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this State, either as a teacher or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever.

New York, Art. IX, Sec. 4. Neither the State nor any sub-division thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

North Carolina, Art. IX, Sec. 4. The proceeds of all lands that have been or hereafter may be granted by the United States to this State, . . . also all moneys, stocks, bonds, and other property, now belonging to any State fund for the purposes of education . . . , together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever.

North Dakota, Art. VIII, Sec. 147. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the Legislative Assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

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Art. VIII, Sec. 152. All colleges, universities and other educational institutions, for the support of which lands have been granted to this State, or which are supported by a public tax, shall remain under the absolute and exclusive control of the State. No money raised for the support of the public schools of the State shall be appropriated to or used for the support of any sectarian school.

Ohio, Art. VI, Sec. 2. No religious or other sect, or sects, shall ever have any exclusive right to or control of, any part of the school funds of this State.

Oklahoma, Art. I, Sec. 5. Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and free from sectarian control.

Art. II, Sec. 5. No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Art. XI, Sec. 3. The interest and income of the permanent school fund, . . . together with any revenues derived from taxes authorized to be levied for such purpose, and any other sums which may be added thereto by law, shall be used and applied each year for the benefit of the common schools of the State, . . . and no part of the fund shall ever be diverted from this purpose, or used for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State.

Oregon, Art. I, Sec. 5. No money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the Legislative Assembly.

Pennsylvania, Art. III, Sec. 17. No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two thirds of all the members elected to each House.

Art. III, Sec. 18. No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association.

Art. X, Sec. 2. No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

Rhode Island, Art. XII, Sec. 2. The money which now is or which may be hereafter appropriated by law for the establishment of a per-

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manent fund for the support of public schools, shall be securely invested, and remain a perpetual fund for that purpose.

Art. XII, Sec. 4. The General Assembly . . . shall not divert said money or fund from the aforesaid uses, nor borrow, appropriate, or use the same, or any part thereof, for any other purpose under any pretense whatsoever.

South Carolina, Art. XI, Sec. 9. The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not come by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

South Dakota, Art. VI, Sec. 3. No money or property of the State shall be given or appropriated for the benefit of any sectarian or religious society or institution.

Art. VIII, Sec. 16. No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the State, or any county or municipality within the State, nor shall the State or any county or municipality within the State accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the State.

Tennessee, Art. XI, Sec. 12. The fund called the common school fund . . . shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools.

Texas, Art. VII, Sec. 5. The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school-fund, shall be the permanent school-fund; and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school-fund, which shall be applied annually to the support of the public free schools. And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof, ever be appropriated to or used for the support of any sectarian school.

UTAH, Art. I, Sec. 4. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or for the support of any ecclesiastical establishment.

Art. X, Sec. 1. The legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all the children of the State and free from sectarian control.

Art. X, Sec. 12. Neither religious nor partisan test or qualification shall be required of any person, as a condition of admission, as teacher or student, into any public educational institution of the State.

Art. X, Sec. 13. Neither the Legislature nor any county, city, town, school district, or other public corporation shall make any appropriation to aid in the support of any school, seminary, academy, college, university, or other institution controlled in whole or in part by any church, sect, or denomination whatever.

VIRGINIA, Art. IV, Sec. 67. The General Assembly shall not make any appropriation of public funds, of personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution, which is not owned or controlled by the State; except that it may, in its discretion, make appropriations to non-sectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities, or towns to make such appropriations to any charitable institution or association.

Art. IX, Sec. 141. No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly, may in its discretion, continue the appropriations to the College of William and Mary; . . . third, that counties, cities, towns, and districts may make appropriations to non-sectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district.

WASHINGTON, Art. I, Sec. 11. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or support of any religious establishment.

Art. IX, Sec. 4. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

West Virginia, Art. XII, Sec. 4. The existing permanent and invested school fund . . . ; all grants, devises or bequests that may be made to this State, for the purposes of education, . . . ; this State's just share of the literary fund of Virginia . . . ; and such sums as may from time to time be appropriated by the Legislature for the purpose, shall be set apart as a separate fund to be called the "School Fund", . . . ; and the interest thereof shall be annually applied to the support of free schools throughout the State, and to no other purpose whatever.

Wisconsin, Art. I, Sec. 18. Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious, or theological seminaries.

Art. X, Sec. 3. The Legislature shall provide by law for the establishment of District Schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.

Art. X, Sec. 6. Provision shall be made by law for the establishment of a State University . . . and no sectarian instruction shall be allowed in such University.

Wyoming, Art. I, Sec. 19. No money of the State shall ever be given or appropriated to any sectarian or religious society or instruction.

Art. III, Sec. 36. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the State, nor to any denomination or sectarian institution or association.

Art. VII, Sec. 8. . . . Nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

Art. VII, Sec. 12. No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the State, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this Constitution.

Appendix B.

Grants and Allowances made by the Legislature of Massachusetts from 1780 to 1859.

1780. Resolves, chap. 51, October.
Minister to Stockbridge Indians exempted from taxes.

1781. Resolves, chap. 87, May.
Minister to Indians allowed 35 pounds for services.

1781. Resolves, chap. 145, May.
To Stephen Sewall, Esq., Hancock Professor of Oriental Languages, 47 pounds, 19 shillings; 4 pounds in full for 1 year and 5 months' service to be paid in new money at rate of $1\frac{7}{8}$ of a dollar for a hard dollar.

1781. Resolves, chap. 149, May.
Rev. Samuel Williams, Hollisian Professor of Mathematics at Harvard College, 175 pounds for 1 year 3 months 20 days' service "to be paid," etc.

1781. Resolves, chap. 152, May.
Rev. Edward Wigglesworth, Professor of Divinity, Harvard College, 150 pounds, for 1 year 5 months' service "to be paid," etc.

1781. Resolves, chap. 186, September.
Paid out of treasury to missionary to Eastern Indians, 142 pounds, 10 shillings. Said sum to be charged to United States.

1781. Resolves, chap. 240, September.
Rev. Joseph Willard, president of Harvard College, granted 300 pounds for first year's service and for the expense of removing his family.

1782. Resolves, chap. 75, May: "On the petition of Juniper Barthiaume, Recollect, Missionary to Penobscot tribe of Indians.
"*Resolved*, That His Excellency the Governor, be, and he is hereby requested, with the advice of Council, to provide for and accommodate the said Juniper, agreeably to his petition, in such manner as shall by His Excellency be judged most proper.
"And it is further *Resolved*, That the Governor be empowered, with the advice of Council, to draw such sum of money out of

Note. — This table of grants and allowances is doubtless incomplete, since it is based upon the indexes of the annual volumes of acts and resolves. It is not probable that all the grants and allowances are entered in the indexes.

the public treasury as may be necessary for the purpose aforesaid, provided the sum thus drawn does not amount to more than the value of the wages and rations which are already become due to the said Juniper, together with the additional sum of thirty shillings, to defray the said Juniper's expenses during his present stay in the Town of Boston."

1783. Resolves, chap. 6, May.
Authorizing sale of land to value of 100 pounds, the proceeds for paying missionary to Herring Pond Indians and remainder to pay "such Protestant Teacher as shall hereafter be appointed to preach among the said Indians."

1783. Resolves, chap. 96, May.
Harvard College, 471 pounds to four professors for services.

1784. Acts, chap. 53.
Incorporating certain persons for purpose of building a bridge between Charlestown and Boston over Charles River. After tolls commence incorporators to pay Harvard College or University 200 pounds annually for 40 years when bridge becomes property of Commonwealth, saving to college or university a reasonable and annual compensation for income of ferry which they might have received had not bridge been erected.

1784. Acts, chap. 6.
Incorporating town of Machias and reserving to use of Harvard College to the first ordained minister, to the use of the ministry, and to the use of the school "several lots in the said tract of land."

1784. Resolves, chap. 26, May.
Rev. Jos. Willard, president of Harvard, 105 pounds, 13 shillings, 4 pence which with former grants is in full for salary to Jan. 1, 1784.
Rev. Samuel Williams, professor at Harvard, 232 pounds, 10 shillings for services.
Rev. Edward Wigglesworth, professor at Harvard, 233 pounds, 7 shillings, 8 pence for services.

1786. Resolves, chap. 63, January.
Grant of 132 pounds, 12 shillings, 2 pence to American Academy of Arts and Sciences.

1786. Resolves, chap. 134, January.
Phillips Academy exempt from taxation on income not exceeding 200 pounds per annum.

1786. Resolves, chap. 75, May.
President of Harvard paid 483 pounds, 6 shillings and 8 pence for services. Two professors given 241 pounds, 13 shillings and 4 pence for services and one professor given 53 pounds, 13 shillings, 4 pence for services.

1786. Resolves, chap. 128, May: Resolve directing the Committee on Unappropriated Lands in Lincoln County to Provide a Minister for the Plantations in said County, etc.

"*Whereas* Religion and Morality have a direct Tendency to promote the Interest and Happiness, not only of Individuals, but of Society in General; And it being the Unhappiness of many of the Infant Plantations in the County of Lincoln, to be destitute of public religious Instruction, and not under circumstances to make necessary Provision for the Support thereof; and it being of the highest consequence, that the earliest Foundation be laid in those Infant Settlements for acquiring the Knowledge of, and of being led to the Practice of Religion and Morality, this Court, from a due Sense of their Importance, and from a parental Regard to those Settlements, have resolved, and do hereby

"*Resolve*, That the Committee on the Subject of Unappropriated Lands in the County of Lincoln, be, and they are hereby directed, as soon as may be, to provide a discreet and suitable Preacher of Religion and Morality, for the Term of Six Months, and instruct him to repair to those Infant Plantations in the said County of Lincoln, and for such a Time to furnish each during the said Term of Six Months, with religious Instruction, as they may judge most conducive to answer the beneficial purposes intended by this Resolve: And that so much of the Taxes on the said Plantations, as by the late Tax of the General Court are laid on them, be appropriated for defraying the Expence of the said mission, the same to be adjusted at the next sitting of the General Court."

1790. Resolves, chap. 63, May.

Three hundred acres of land in each of twelve townships appropriated to Harvard College forever.

1790. Resolves, chap. 63, January.

One hundred and fifty pounds to treasurer of Society for Propagating the Gospel among Indians and others in North America.

1791. Acts, chap. 50.

Washington Academy in town of Machias established and township of land 6 miles square granted, with usual reservation and settlement.

1791. Acts, chap. 26.

Fryeburg Academy established and granted 12,000 acres of land in York County.

1791. Resolves, chap. 7, May.

Township land 6 miles square granted Hallowell Academy, providing 20 families shall settle within five years. Three lots,

320 acres each, reserved for: first settled minister, one for use of ministry, and one for use and support of schools within town.

1791. Resolves, chap. 74, January.
Berwick Academy granted a township of land 6 miles square in the district of Maine, with usual reservations and settlements.

1792. Acts, chap. 22.
Bristol Academy established in the town of Taunton and granted a township of land 6 miles square in the district of Maine.

1792. Resolves, chap. 158, January.
Three thousand acres of land granted for use of Fryeburg Academy.

1792. Resolves, chap. 64, May.
Township of land, 6 miles, granted to Leicester Academy.[1]

1792. Resolves, chap. 11, January.
Township of land, 6 miles square, granted to Marblehead Academy.[1]

1793. Acts, chap. 15.
Williams College established and 1,200 pounds granted, 300 pounds to be expended annually for four years.

1794. Acts, chap. 12.
Bowdoin College established and granted 5 townships of land of contents of 6 miles square each "and provided also there shall be reserved in each township three lots of three hundred and twenty acres each for the following uses, viz. — one lot for the first settled minister, one lot for the use of the ministry, and one lot for the use of schools in each of said townships." [2]

1795. Acts, chap. 76.
Two hundred pounds to be paid annually by proprietors of West Boston Bridge to establish two tutors in Harvard University (this act altered a previous appropriating act).

1795. Resolves, chap. 44, January.
Five hundred dollars to Society for Propagating the Gospel among the Indians to carry on benevolent purposes of their Institution.

1795. Resolves, chap. 41, January.
Two townships of land, 6 miles square each in the district of Maine, granted the trustees of Williams College and their successors, provided that "there be reserved in each Township three lots of three hundred and twenty acres each, for the following uses, viz.; one lot for the first settled minister,

[1] With usual reservations and settlements.
[2] With usual settlements.

one lot for the use of the ministry and one lot for the use of schools in each of said townships." [1]

1796. Resolves, chap. 45, January.

Trustees of Dummer Academy, Phillips Academy, Groton Academy and Westford each granted one-half township 6 miles square in some of unappropriated lands in district of Maine.[2]

1796. Resolves, chap. 22, January.

Congregational minister, with selectmen of Lanesborough authorized to sell ministry lands and income from sale to be for support of public worship of God in manner following: $66.67 annually to minister in addition to his present salary, two-thirds of remainder to minister as part of his salary and other one-third to minister of Protestant Episcopal church as part of his annual salary, provided that Legislature may make new appropriation of income on application of any denomination of Christians having a settled minister in said town thereafter.

1796. Acts, chap. 69.

An Act providing for the support of ministers in new plantations (temporary act of 1750 made perpetual).

1797. Resolves, chap. 25, May.

Trustees of Deerfield Academy granted one-half a township of land 6 miles square in district of Maine.[2]

1797. Resolves, chap. 46, May.

Trustees of Academy of New Salem granted one-half a township of land 6 miles square in district of Maine.[2]

1797. Resolves, chap. 6, May.

Trustees of Westfield Academy granted one-half a township of land 6 miles square in district of Maine.[1]

1797. Acts, chap. 78.

Trustees of Milton Academy granted one-half a township of land 6 miles square in district of Maine.[2]

1797. Resolves, chap. 103, January.

Society for Propagating the Gospel among the Indians granted $500 for instruction in religion, morality and common school learning.

1798. Acts, chap. 71.

Bridgewater Academy established and one-half a township of land 6 miles square granted in district of Maine.

1798. Acts, chap. 79.

Framingham Academy established and one-half a township of land 6 miles square granted in counties of Lincoln, Hancock or Washington.

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[1] With usual settlements.

[2] With usual reservations and settlements.

1798. Resolves, chap. 80, January.
Trustees of Portland Academy granted one-half a township of land 6 miles square in district of Maine.[1]

1798. Resolves, chap. 69*a*, May.
Two hundred dollars per annum for support of a teacher of religion and morality among the Penobscot and Passamaquoddy Indians "on the petition of Francis Antony Matignon, Minister of the Catholick Church in Boston."

1799. Acts, chap. 41.
Altered the annual expenditure of the 200 pounds given by proprietors of West Boston Bridge to Harvard College by an act of 1796.

1799. Resolves, chap. 80, January.
Five hundred dollars annual grant to Society for Propagating the Gospel among the Indians.

1800. Acts, chap. 53.
Lincoln Academy established in New Castle, Lincoln County. A conditional grant of land (one-half a township) if academy secured within three years funds amounting to $3,000.

1800. Acts, chap. 61.
Academy established in Nantucket and granted one-half a township of land 6 miles square in district of Maine.[2]

1800. Resolves, chap. 131, January.
Granted town of Norway in Cumberland County 600 acres of unappropriated land of Commonwealth in district of Maine, — one-third for use of the first Congregational minister settled in said town, one-third for use of ministry and residue for use of schools in said town.

1801. Resolves, chap. 54, May.
Copper plates engraved for maps of this Commonwealth granted to the Academy of Arts and Sciences and to the Massachusetts Historical Society, the profits therefrom to be equally divided between said societies.

1801. Resolves, chap. 129, January.
Five hundred dollars granted Society for Propagating the Gospel among the Indians and others.

1801. Resolves, chap. 52, May.
The grammar school in town of Monmouth, Kennebeck County, granted 1,500 acres of unappropriated lands of Commonwealth in district of Maine if within two years sum of $1,500 is raised for support of said school.

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[1] With reservations and settlements.

[2] With usual reservations and conditions.

1802. Acts, chap. 82.
Berkshire Academy established (name changed to Lenox Academy later) and granted one-half a township of land 6 miles square in district of Maine.[1]

1802. Resolves, chap. 92, January.
Trustees of Lincoln Academy granted a gore of land in district of Maine.[2]

1802. Resolves, chap. 64, January. "On the petition of James Renatus Romagne, a Teacher of Morality and Religion among the Penobscot and Passamaquoddy Tribes of Indians.
"*Resolved*, that there be and hereby is Appropriated a further sum of seventy-five Dollars pr. annum, in Addition to Two hundred Dollars Appropriated by a Resolve of the Legislature of June 28, 1798 for the support of said Romagne a Teacher of Morality and Religion among the said Tribes of Indians until the further order of the Genl. Court."

1803. Resolves, chap. 28, May.
Trustees of Blue Hill and Hampden Academies each granted one-half a township of land 6 miles square in district of Maine.[3]

1803. Resolves, chap. 29, May.
Trustees of Derby Academy in Hingham granted one-half a township of land 6 miles square in district of Maine.[3]

1803. Resolves, chap. 32, May.
Trustees of Gorham Academy granted one-half a township of land 6 miles square in district of Maine, provided academy shall have secured $3,000.

1803. Acts, chap. 84.
Trustees of Sandwich Academy granted one-half a township of land 6 miles square in district of Maine.[3]

1803. Resolves, chap. 47, May.
Six hundred dollars to Massachusetts Society for Propagating the Gospel among the Indians and others in North America.

1803. Resolves, chap. 134, January.
One thousand dollars to Society for Propagating the Gospel among the Indians and others in North America.

1804. Resolves, chap. 20, May.
Three hundred dollars to trustees of Hampshire Missionary Society for purpose of supporting and educating two Indian boys.

1804. Resolves, chap. 92, January.
Williams College granted a township of land 6 miles square in district of Maine provided that trustees settled fifteen families

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[1] With usual reservations and conditions.
[2] With usual reservations.
[3] Subject to usual reservations and conditions.

in said township within twelve years of passage of this resolve and also there be reserved three lots of 320 acres each, one for first settled minister, one for use of ministry and one for use of schools in said township.

1804. Resolves, chap. 107, January.
A township of land 6 miles square in district of Maine granted Massachusetts Agricultural Society, provided trustees of said society shall cause fifteen families to be settled in said township within twelve years from passage of resolve and also reserve three lots of 320 acres each, one for first settled minister, one for use of ministry and one for use of schools in said township, for support and maintenance of Professorship of Botany.

1804. Resolves, chap. 114, January.
Society for Propagating the Gospel among Indians and others in North America granted $1,000.

1804. Resolves, chap. 142, January.
Hallowell Academy granted one-quarter of a township of land 6 miles square in district of Maine (because academy hall had been consumed by fire).

1804. Acts, chap. 129.
Bath Academy established and granted one-half township 6 miles square of land in district of Maine.[1]

1805. Resolves, chap. 140, January.
Bowdoin College granted a township of land.

1807. Resolves, chap. 20, January.
Monson Academy granted one-half a township 6 miles square in district of Maine.[1]

1807. Resolves, chap. 67, February.
Hebron Academy granted one-half a township 6 miles square in district of Maine.[1]

1807. Resolves, chap. 72, February.
Society for Propagating the Gospel among the Indians and others granted $1,000 for purchase of religious books, in educating the youth, and for propagating the gospel.

1807. Resolves, chap. 80, February.
Sum of $75 per annum in addition to $275 to Jas. Renatus Romagne, a teacher of morality and religion among Indians.

1808. Acts, chap. 59 (p. 257), February.
Warren Academy established and one-half a township 6 miles square in district of Maine granted.[1]

1808. Acts, chap. 65 (p. 270), February.
Belfast Academy established and one-half a township 6 miles square granted in district of Maine.[1]

[1] Subject to usual reservations and settlements.

1808. Acts, chap. 26 (p. 418), November.
Phillips Limerick Academy established and one-half a township 6 miles square in district of Maine granted.[1]

1808. Resolves, chap. 87, March.
Trustees of Bowdoin College granted two additional townships 6 miles square each in district of Maine.[1]

1808. Resolves, chap. 57, February.
Township of land 6 miles square in Maine granted to town of Plymouth for preservation of their harbor by repairing beach.[1]

1808. Acts, chap. 105.
Bridgeton Academy established and granted half a township of land 6 miles square in district of Maine, subject to usual reservations and restrictions.

1809. Resolves, chap. 301, March.
For support and maintenance of professorship of natural history at Cambridge a township of land 6 miles square in Maine, provided that fifteen families settle within twelve years, and also that three lots are reserved of 320 acres each, one for minister, one for ministry and one for use of schools in said township.

1809. Resolves, chap. 254, February.
Society for Propagating the Gospel among Indians in North America and others granted sum of $500.

1809. Resolves, chap. 261, February.
Williams College granted one township 6 miles square in Maine, provided that three lots, 320 acres each be reserved, one for first settled minister, one for use of ministry and one for use of schools, provided fifteen families settled in the township within twelve years.

1810. Resolves, chap. 63, January.
Trustees of Monmouth Academy granted 10,020 acres of land in Maine provided academy raises $3,000.

1810. Resolves, chap. 161, March.
Trustees of Days Academy granted one-half a township 6 miles square in district of Maine provided that there be reserved 480 acres, 320 for use of ministry and 160 for use of schools in said township, and academy secure $3,500.

1810. Resolves, chap. 86, February.
Massachusetts Medical Society granted a township of land 6 miles square in the district of Maine, subject to usual reservations and settlements.

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[1] Subject to usual reservations and settlements.

1811. Resolves, chap. 1, February.

Trustees of Farmington Academy granted 10,020 acres of land in district of Maine. Chap. 116, February, 1812, makes grant one of one-half a township 6 miles square and academy secure $3,000.

1811. Acts, chap. 94, February.

The Province House, official residence of the Governor of the Commonwealth, granted to the Massachusetts General Hospital.

1811. Resolves, chap. 99, February.

Agents of town of Brunswick authorized to convey and set off to president and trustees of Bowdoin College 200 acres of common land of town.

1811. Resolves, chap. 35, June.

Town of Saco authorized to set off one-quarter of an acre of land (said land being part granted town by General Court, 1798, for burial and training field) for use of Saco Academy.

1812. Resolves, chap. 117, February.

Agents for eastern lands are directed to give trustees of Monmouth Academy a deed of all the surplus lands that remain unconveyed in a certain township estimated to be about 800 acres.

1813. Acts, chap. 131, February.

Maine Literary and Theological Institution established and granted a township of land 6 miles square in district of Maine, with usual restrictions and reservations.

1814. Acts, chap. 150, February.[1]

Tax which Massachusetts bank pays Commonwealth to be appropriated for next ten years as follows: 1 9/16 parts to president and Fellows of Harvard College, 3/16 parts to president and Trustees of Williams College, 3/16 parts to president and Trustees of Bowdoin College.

1814. Resolves, chap. 185, February.

Trustees of Lincoln Academy, who by resolve of Feb. 25, 1813,[2] were granted one-half a township of land, with proviso that three lots be held for public uses, are, under provision of this resolve, exempted from holding aforesaid lots.

1816. Resolves, chap. 95, January.

Resolve relinquishing land in Princeton to the Society for Propagating the Gospel among the Indians and others in North America.

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[1] Act entitled "An Act for the encouragement of Literature, Piety and Morality, and the useful Arts and Sciences."

[2] Not noted elsewhere.

1816. Resolves, chap. 114, December.
Five hundred dollars granted for repairing house of public worship for use of Indians at Mashpee.

1816. Resolves, chap. 134, December.
Trustees of Amherst Academy granted one-half township of land 6 miles square in district of Maine, with usual reservations and restrictions.

1817. Resolves, chap. 25, June.
Stone used in erection of Massachusetts General Hospital shall be hammered and fitted for use, free of expense, by convicts at State Prison.

1818. Resolves, chap. 91, January.
Trustees of Canaan Academy granted one-half township of land 6 miles square in district of Maine, subject to usual reservations.

1819. Resolves, chap. 44, June.
Asylum in Hartford granted $4,000 annually for period of six years for board and instruction of deaf and dumb.

1819. Resolves, chap. 210, January.
Three hundred and fifty dollars granted annually for payment to a priest to the Passamaquoddy tribe of Indians, "conformably to the religious sentiments or persuasion of the said tribes."

1820. Resolves, chap. 77, January.
One hundred and fifty dollars appropriated to repair the meeting house of the Herring Pond tribe of Indians.

1820. Resolves, chap. 78, January.
Trustees of Leicester Academy petitioned the Legislature that attorney-general, at expense of trustees, seek to recover land of a certain Frenchman which had escheated to Commonwealth in order that it be granted to the said trustees in aid of the funds of that institution.

1820. Resolves, chap. 5, June.
Trustees of Hopkins Academy granted one-half township of land 6 miles square in State of Maine, reserving 4 acres, one-half for the use of schools and one-half for the use of the ministry therein, with usual settlement.

1820. Resolves, chap. 7, June.
Three hundred dollars appropriated for building a house of public worship and a schoolhouse on Island of Chappaquiddick for the Chappaquiddick Indians.

1823. Resolves, chap. 53, February 8.
Trustees of Leicester Academy petitioned and were granted, for benefit of institution, certain estate in Paxton which had escheated to the Commonwealth.

1824. Resolves, chap. 50, February.
State assumes debt of $4,176.43 for work of convicts from State Prison on Massachusetts General Hospital.

1824. Resolves, chap. 8, June.
Massachusetts Historical Society, granted $1,400 for furnishing the Commonwealth with 350 copies of History of New England.

1824. Acts, chap. 137, February.
Trustees of Berkshire Medical Institution granted $1,000 annually for five years for encouragement of medical science.

1825. Resolves, chap. 66, February.
Trustees of Nichols Academy granted one-half a township of land 6 miles square in State of Maine.

1825. Resolves, chap. 83, February.
Annual appropriation of $6,000 to American Asylum at Hartford, over and above sums appropriated to defray expenses of board and instruction of deaf and dumb persons.

1826. Resolves, chap. 70, February.
Trustees of Bridgewater granted $350 for use of Academy.

1827. Resolves, chap. 35, January.
American Asylum at Hartford granted $500 for expenses of board and instruction of deaf and dumb persons.

1828. Resolves, chap. 99, March.
Trustees of Wesleyan Academy given one-half a township of land 6 miles square in State of Maine, subject to usual reservations.

1829. Resolves, chap. 41, February.
American Asylum at Hartford granted annually a sum not exceeding $6,500.

1829. Resolves, chap. 43, February.
Three hundred dollars payable to Guardians of Indians on Martha's Vineyard for a meeting house and schoolhouse.

1829. Resolves, chap. 8, June.
Prison Discipline Society, 4th report, 600 copies purchased at not exceeding 25 cents a copy.

1829. Resolves, chap. 60, February.
Massachusetts Society for Promoting Agriculture granted one-half a township 6 miles by 3 miles for support of Massachusetts professorship of Natural History in lieu of a township granted March 4, 1809, with three lots of 160 acres reserved, one for first settled minister, his heirs and assigns, one for use of ministry and one for use of schools in township.

1830. Resolves, chap. 53, March.
Four hundred dollars appropriated for purpose of erecting two schoolhouses for Mashpee Indians on their plantation.

1830. Resolves, chap. 81, March.
New England Asylum for Blind granted unexpended balance of each year from fund for educating deaf and dumb.

1831. Resolves, chap. 23, January.
Six hundred copies of report of Prison Discipline Society, not exceeding 20 cents a copy, purchased for use of Legislature.

1833. Resolves, chap. 28, February.
New England Asylum for Blind granted $6,000 annually.

1835. Resolves, chap. 100, April.
Judge of Probate Court in Dukes County to pay $50 annually for support of common schools among Indians in county, under the superintendence of the missionary residing among them.

1835. Resolves, chap. 76, March.
Dukes County Academy granted $3,000 provided that in a year academy secure equal amount outside.

1835. Resolves, chap. 61, March.
Prison Discipline Society granted $1,000, being part of sum paid by said society to the chaplain of the State Prison previous to 1832.

1836. Resolves, chap. 8, February.
Prison Discipline Society given $451.27, being balance of sum they paid chaplain of the State Prison previous to 1832.

1837. Resolves, chap. 13, February.
Secretary of Commonwealth authorized to purchase 750 copies of the 11th annual report of Prison Discipline Society, at not exceeding 25 cents a copy, for distribution to General Court.

1837. Resolves, chap. 19, February.
Bowdoin College released from claim arising from breach of performance of conditions in granting of certain lands.

1838. Resolves, chap. 1, January.
Secretary of Commonwealth instructed to purchase 600 copies of the 12th annual report of the Prison Discipline Society, at a price not exceeding 25 cents a copy, to be distributed to General Court.

1838. Acts, chap. 154.
One hundred and forty dollars granted annually in support of common schools among certain tribes of Indians.

1839. Resolves, chap. 6.
Secretary of Commonwealth to purchase 600 copies of Prison Discipline Society report, price not to exceed 25 cents a copy.

1840. Resolves, chap. 5.
Secretary of Commonwealth to purchase 600 copies of above report, price not to exceed 25 cents a copy.

1840. Resolves, chap. 44.
American Institute of Instruction granted $300 per annum for five years.

1841. Resolves, chap. 16.
Secretary of Commonwealth to purchase 500 copies of above report for $125.

1842. Resolves, chap. 7.
Secretary of Commonwealth to purchase 500 copies of above report for $125.

1842. Resolves, chap. 43.
Massachusetts Eye and Ear Infirmary granted $2,000 per annum for five years.

1845. Resolves, chap. 112.
American Institute of Instruction granted $300 per annum for five years.

1846. Acts, chap. 99.
To establish teachers' institute, expenses not exceeding $200 for each institute to be defrayed.

1846. Resolves, chap. 145.
Massachusetts Charitable Eye and Ear Infirmary granted $5,000 a year for term of three years from April 1, 1848.

1847. Resolves, chap. 33.
Amherst College granted annual allowance of $5,000 for five years, starting June 1, 1847.

1847. Resolves, chap. 49.
Perkins Institution and Massachusetts Asylum for Blind granted appropriation of $9,000 annually, said payments to continue during pleasure of Legislature; all previous resolves granting money to institution repealed.

1847. Resolves, chap. 94.
Support of deaf mutes in asylum at Hartford; American Asylum for the Deaf and Dumb at Hartford given an additional appropriation of $2,000 annually.

1847. Resolves, chap. 98.
Harvard College given annual allowance of $666.66 for annuity secured through charter of proprietors of Charles River Bridge, and in lieu of payments which have become due there is paid $3,333.30.

1848. Acts, chap. 244.
Wesleyan Academy in Wilbraham granted one-half the proceeds of a sale of township in Maine, 6 miles square.

1848. Acts, chap. 301.
County association of teachers holding semi-annual meetings entitled to $50 from State.

1848. Resolves, chap. 14.
Massachusetts Charitable Eye and Ear Infirmary granted $2,000 per annum for five years from April 14, 1848.

1848. Resolves, chap. 65.
A sum not exceeding $2,500 granted annually for three years to any institution to undertake training and teaching of ten idiotic children.

1849. Resolves, chap. 59.
Two thousand five hundred dollars to Massachusetts Humane Society to procure three lifeboats to be stationed on exposed portions of the coast.

1849. Resolves, chap. 77.
Five thousand dollars granted to Perkins Institution provided that institution add like sum for establishing a suitable workshop for employment of adult poor blind persons.

1850. Resolves, chap. 65.
Five hundred dollars additional granted for teachers' institutes (also chap. 99 of 1846).

1850. Resolves, chap. 81.
Berkshire Medical Institute granted $10,000 to replace building and apparatus lost by fire; considered educational expense under chap. 219 of Acts of 1846.

1852. Resolves, chap. 2.
Teachers' Institute to receive $1,250 annually in addition to sums previously granted.

1852. Resolves, chap. 36.
Massachusetts Humane Society granted $2,500 for repairing lifeboats and apparatus.

1853. Resolves, chap. 9.
Massachusetts Teachers' Association granted $300 annually for five years for purposes of association.

1853. Resolves, chap. 91.
New England School of Design for Women granted $1,500 annually for three years.

1853. Resolves, chap. 40.
Massachusetts Eye and Ear Infirmary granted $2,500 annually for five years.

1855. Resolves, chap. 36.
American Institute of Instruction granted $300 annually for five years.

1855. Resolves, chap. 62.
Perkins Institution and Massachusetts Asylum for the Blind granted $12,000 a year.

1855. Resolves, chap. 45.
Female Medical Educational Society granted $10,000 in four annual payments for suitable building, library, apparatus, etc.

1855. Resolves, chap. 58.
Massachusetts School for Idiots and Feeble-minded Youth granted $25,000, appropriated for erecting a suitable building.

1856. Acts, chap. 148.
Trustees of Westfield Academy granted $5,000 for agricultural department in academy.

1856. Resolves, chap. 20.
To aid in support of a school among Herring Pond Indians, $60 granted annually for five years.

1856. Resolves, chap. 90.
New England School of Design for Women granted $1,000 annually for two years.

1856. Resolves, chap. 99.
Three thousand dollars granted to Pilgrim Society of Plymouth for an alto-relief in marble for one of panels of monument being erected at Plymouth.

1857. Resolves, chap. 35.
Massachusetts State Teachers' Association allowed $900 on condition that they furnish school committees in State with a copy of the Massachusetts Teacher.

1857. Resolves, chap. 108.
Massachusetts School for Idiotic and Feeble-minded Youth annual appropriation increased to $7,500.

1858. Resolves, chap. 7.
Massachusetts School for Idiotic and Feeble-minded Youth granted $7,500 for current year.

1858. Resolves, chap. 8.
Massachusetts Charitable Eye and Ear Infirmary granted $2,500 for current year.

1859. Acts, chap. 154.
Grants to the following institutions from the proceeds of the sales of Back Bay lands: Museum of Comparative Zoölogy, a sum not exceeding $100,000; Tufts College, a sum not exceeding $50,000; Williams College, a sum not exceeding $25,000; Amherst College, a sum not exceeding $25,000; Wesleyan Academy, Wilbraham, a sum not exceeding $25,000. None of these payments to be made unless institution had secured a sum equal to amount paid by State, and provided further that Williams, Tufts and Amherst Colleges each establish three free scholarships.

1859. Resolves, chap. 4.
Massachusetts Charitable Eye and Ear Infirmary granted $2,500 for the current year.

1859. Resolves, chap. 8.
Massachusetts Teachers' Association granted $300.

1859. Resolves, chap. 17.
Massachusetts School for Idiotic and Feeble-minded Youth granted $7,500 for the current year.

1859. Resolves, chap. 34.
Massachusetts School for Idiotic and Feeble-minded Youth granted $4,000 for completing building.

Appendix C.

Statement of Grants and Allowances by the Legislature to Sundry Institutions, etc., from 1860 to 1916, inclusive.

Institutions, etc.	1860.	1861.	1862.	1863.	1864.	1865.	1866.
Charitable, etc.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$12,000 00	$15,000 00	$15,000 00	$12,000 00	$16,000 00	$16,000 00	$20,000 00
Buildings,	–	–	–	–	–	–	–
New Bedford Women's Relief Association,	1,500 00	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	7,500 00	12,000 00	9,000 00	9,000 00	9,000 00	12,000 00	12,000 00
Buildings,	–	–	–	–	–	–	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	2,500 00	2,500 00	1,500 00	1,500 00	2,500 00	2,500 00	3,500 00
Buildings,	–	–	–	–	–	–	–
Washingtonian Home,	3,000 00	5,000 00	3,000 00	3,000 00	4,000 00	5,000 00	6,000 00
Asylum for Discharged Female Prisoners,	–	–	–	–	–	2,500 00	2,500 00
Home for Friendless Women and Children,	–	–	–	–	–	–	2,000 00
New England Hospital for Women,	–	–	–	–	–	5,000 00	5,000 00
House of the Good Shepherd,	–	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	608 54	–	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Hospital Cottages at Baldwinsville,	–	–	–	–	–	–	–
Carney Hospital,	–	–	–	–	–	–	–
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	–	–	–	–
Massachusetts State Firemen's Association,	–	–	–	–	–	–	–
Educational.							
Massachusetts Institute of Technology: —							
Maintenance,	–	–	–	323,040 00[1]	–	–	–
Income from fund,	–	–	–	–	–	–	–

Massachusetts Agricultural College: —							
Income from fund,	–	–	–	–	–	–	–
General maintenance, etc.,	–	–	–	–	10,500 00	20,121 92	–
Buildings,	–	–	–	–	–	–	–
Museum of Zoölogy: —							
Maintenance,	–	20,000 00	3,500 00	10,000 00	–	–	–
From Back Bay Lands fund,	–	20,657 00	–	79,343 00	12,207 67	–	–
Tufts College, from Back Bay Lands fund,	–	12,394 00	–	37,606 00	–	–	–
Williams College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	6,197 00	–	18,803 00	–	–	–
Amherst College: —							
Maintenance,	–	–	–	2,500 00	–	–	–
From Back Bay Lands fund,	–	6,197 00	–	18,803 00	–	–	–
Wesleyan Academy: —							
Maintenance,	22,000 00	–	–	–	–	–	–
From Back Bay Lands fund,	–	6,197 00	–	19,101 04	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–	–
Dukes County Academy,	–	–	–	–	–	–	–
New Salem Academy,	–	–	–	–	–	–	–
Worcester Polytechnic Institute,	–	–	–	–	–	–	–
New England Industrial School for Deaf Mutes,	–	–	–	–	–	–	–
Lowell Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
New Bedford Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
MISCELLANEOUS.							
Monuments, memorials, etc.,	–	–	–	600 00	–	3,500 00	–
Centennial expositions, etc.,	–	–	–	–	–	–	–
Towns and special items,	–	–	–	–	–	–	–
	$48,500 00	$106,142 00	$32,608 54	$535,296 04	$54,207 67	$66,621 92	$51,000 00

[1] Valuation, in 1863, of land received from the Back Bay.

Statement of Grants and Allowances, etc. — Continued.

Institutions, etc.	1867.	1868.	1869.	1870.	1871.	1872.	1873.
Charitable, etc.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$20,000 00	$25,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	40,000 00	40,000 00	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	15,000 00	15,000 00	16,500 00	16,500 00	16,500 00	16,500 00	16,500 00
Buildings,	–	16,000 00	5,000 00	–	–	–	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	5,000 00	5,000 00	5,000 00	6,000 00	6,000 00	6,000 00	10,000 00
Buildings,	–	–	–	–	–	–	–
Washingtonian Home,	6,000 00	6,000 00	6,000 00	6,000 00	6,000 00	–	–
Asylum for Discharged Female Prisoners,	2,500 00	2,500 00	2,500 00	2,500 00	2,000 00	1,500 00	1,500 00
Home for Friendless Women and Children,	2,000 00	2,000 00	2,000 00	2,000 00	2,000 00	–	–
New England Hospital for Women,	–	1,000 00	1,000 00	1,000 00	1,000 00	–	–
House of the Good Shepherd,	–	–	–	10,000 00	–	–	–
House of the Guardian Angel,	–	–	2,000 00	3,500 00	3,500 00	–	–
New England Female Moral Reform Society,	600 00	–	–	1,000 00	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Hospital Cottages at Baldwinsville,	–	–	–	–	–	–	–
Carney Hospital,	–	–	–	–	–	–	–
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	–	–	–	–
Massachusetts State Firemen's Association,	–	–	–	–	–	–	–
Educational.							
Massachusetts Institute of Technology: —							
Maintenance,	–	–	–	–	–	–	–
Income from fund,	–	6,226 26	4,517 76	2,419 92	6,182 11	5,768 87	7,463 11

Massachusetts Agricultural College: —							
Income from fund,	–	10,457 54	9,035 52	4,839 82	12,546 32	11,537 74	14,926 21
General maintenance, etc.,	–	50,000 00	50,000 00	25,000 00	50,000 00	–	–
Buildings,	–	–	–	–	–	–	–
Museum of Zoölogy: —							
Maintenance,	10,000 00	25,000 00	25,000 00	25,000 00	50,000 00	–	25,000 00
From Back Bay Lands fund,	–	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–	–
Williams College: —							
Maintenance,	–	25,000 00	25,000 00	25,000 00	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Amherst College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Wesleyan Academy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	40,000 00	–	–	–	–	–
Dukes County Academy,	–	–	–	–	5,000 00	–	–
New Salem Academy,	–	–	10,000 00	–	–	–	–
Worcester Polytechnic Institute,	–	–	50,000 00	–	–	–	–
New England Industrial School for Deaf Mutes,	–	–	–	–	–	–	–
Lowell Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
New Bedford Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
MISCELLANEOUS.							
Monuments, memorials, etc.,	2,500 00	–	–	–	1,650 00	30,000 00	–
Centennial expositions, etc.,	10,000 00	–	–	–	–	–	15,000 00
Towns and special items,	–	–	–	–	–	–	–
	$73,600 00	$229,183 80	$283,553 28	$200,759 74	$192,378 43	$101,306 61	$120,389 32

STATEMENT OF GRANTS AND ALLOWANCES, ETC. — Continued.

INSTITUTIONS, ETC.	1874.	1875.	1876.	1877.	1878.	1879.	1880.
CHARITABLE, ETC.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	–	–	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	20,000 00	20,000 00	17,500 00	26,000 00	26,000 00	17,500 00	17,500 00
Buildings,	–	–	–	–	–	–	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	8,500 00	7,500 00	7,500 00	10,000 00	8,000 00	9,000 00	9,000 00
Buildings,	–	–	–	–	–	–	–
Washingtonian Home,	–	–	–	–	–	–	–
Asylum for Discharged Female Prisoners,	1,500 00	1,500 00	1,500 00	1,500 00	–	–	–
Home for Friendless Women and Children,	–	–	–	–	–	–	–
New England Hospital for Women,	–	–	–	–	–	–	–
House of the Good Shepherd,	–	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	–	–	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Hospital Cottages at Baldwinsville,	–	–	–	–	–	–	–
Carney Hospital,	–	–	–	–	–	–	–
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	–	–	–	–
Massachusetts State Firemen's Association,	–	–	–	–	–	–	–
EDUCATIONAL.							
Massachusetts Institute of Technology: —							
Maintenance,	–	–	–	–	–	–	–
Income from fund,	9,651 87	5,990 26	9,328 64	5,226 38	8,798 49	6,360 06	4,609 94

Massachusetts Agricultural College: —							
Income from fund,	19,303 75	15,459 00	15,178 66	10,452 76	17,596 99	12,720 11	9,219 86
General maintenance, etc.,	18,000 00	–	5,000 00	5,000 00	–	32,000 00	–
Buildings,	–	–	–	–	–	–	–
Museum of Zoölogy: —							
Maintenance,	50,000 00	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–	–
Williams College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Amherst College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Wesleyan Academy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–	–
Dukes County Academy,	–	–	–	–	–	–	–
New Salem Academy,	–	–	–	–	–	–	–
Worcester Polytechnic Institute,	–	–	–	–	–	–	–
New England Industrial School for Deaf Mutes,	–	–	–	–	–	–	–
Lowell Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
New Bedford Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
MISCELLANEOUS.							
Monuments, memorials, etc.,	–	–	–	–	10,000 00	–	250 00
Centennial expositions, etc.,	–	68,000 00	8,100 00	–	–	–	–
Towns and special items,	101,942 99	–	–	–	–	–	–
	$258,898 61	$148,449 26	$94,107 30	$88,179 14	$100,395 48	$107,580 17	$70,579 80

INSTITUTIONS, ETC.	1881.	1882.	1883.	1884.	1885.	1886.	1887.
CHARITABLE, ETC.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	–	–	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	17,500 00	22,000 00	17,500 00	10,770 08	11,188 41	22,077 26	47,526 45
Buildings,	–	–	–	–	–	–	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	15,000 00	10,000 00	10,000 00	10,000 00	10,000 00	15,000 00	15,000 00
Buildings,	–	–	–	–	–	–	–
Washingtonian Home,	–	–	–	–	–	–	–
Asylum for Discharged Female Prisoners,	–	–	–	–	–	–	–
Home for Friendless Women and Children,	–	–	–	–	–	–	–
New England Hospital for Women,	–	–	–	–	–	–	–
House of the Good Shepherd,	–	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	–	–	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	–	–	15,000 00	15,000 00	15,000 00	20,000 00	20,000 00
Buildings,	–	–	–	–	–	–	–
Hospital cottages at Baldwinsville,	–	–	–	–	–	–	10,000 00
Carney Hospital,	–	–	–	–	–	–	10,000 00
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	–	–	–	–
Massachusetts State Firemen's Association,	–	–	–	–	–	–	–
EDUCATIONAL.							
Massachusetts Institute of Technology: —							
Maintenance,	–	–	–	–	–	–	–
Income from fund,	6,051 93	6,737 23	5,888 41	5,910 91	5,132 76	5,265 68	4,917 52

Massachusetts Agricultural College: —							
Income from fund,	12,103 84	13,474 49	11,775 83	11,821 85	10,265 53	10,531 36	9,835 03
General maintenance, etc.,	–	15,685 95	15,000 00	51,000 00	26,000 00	26,500 00	20,000 00
Buildings,	–	–	–	–	–	–	–
Museum of Zoölogy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–	–
Williams College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Amherst College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Wesleyan Academy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–	–
Dukes County Academy,	–	–	–	–	–	–	–
New Salem Academy,	–	–	–	–	–	–	–
Worcester Polytechnic Institute,	–	–	–	–	–	50,000 00	–
New England Industrial School for Deaf Mutes,	–	–	–	–	–	2,000 00	2,000 00
Lowell Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
New Bedford Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
MISCELLANEOUS.							
Monuments, memorials, etc.,	–	–	5,000 00	12,500 00	500 00	13,500 00	10,500 00
Centennial expositions, etc.,	10,000 00	–	–	–	300 00	–	40,000 00
Towns and special items,	34,000 00	55,000 00	–	–	–	–	–
	$124,655 77	$152,897 67	$110,164 24	$147,002 84	$108,386 70	$194,874 30	$219,779 00

STATEMENT OF GRANTS AND ALLOWANCES, ETC. — Continued.

INSTITUTIONS, ETC.	1888.	1889.	1890.	1891.	1892.	1893.	1894.
CHARITABLE, ETC.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	–	–	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	36,142 76	30,103 61	31,928 73	25,000 00	25,000 00	25,000 00	25,000 00
Buildings,	50,000 00	75,000 00	75,000 00	10,000 00	–	21,000 00	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	15,000 00	15,000 00	15,000 00	15,000 00	20,000 00	20,000 00	20,000 00
Buildings,	–	–	–	20,000 00	–	–	–
Washingtonian Home,	–	–	–	–	–	–	–
Asylum for Discharged Female Prisoners,	–	–	–	–	–	–	–
Home for Friendless Women and Children,	–	–	–	–	–	–	–
New England Hospital for Women,	–	–	–	–	–	–	–
House of the Good Shepherd,	–	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	–	–	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	20,000 00	20,000 00	25,000 00	25,000 00	30,000 00	30,000 00	30,000 00
Buildings,	–	50,000 00	–	–	–	–	–
Hospital Cottages at Baldwinsville,	–	55,000 00	30,000 00	–	–	–	–
Carney Hospital,	–	–	–	10,000 00	–	–	–
Massachusetts Homœopathic Hospital,	–	–	120,000 00	–	–	–	–
Woman's Charity Club,	–	–	–	10,000 00	–	–	–
Massachusetts State Firemen's Association,	–	–	10,000 00	10,000 00	10,000 00	10,000 00	10,000 00
EDUCATIONAL.							
Massachusetts Institute of Technology: —							
Maintenance,	100,000 00	50,000 00	50,000 00	–	–	–	–
Income from fund,	5,721 01	5,504 42	4,960 82	5,640 97	5,712 93	4,785 76	5,079 50

Massachusetts Agricultural College: —							
Income from fund,	11,442 00	11,008 84	9,921 64	11,281 96	11,425 87	9,571 51	10,159 00
General maintenance, etc.,	39,000 00	40,000 00	30,000 00	30,000 00	30,000 00	30,000 00	30,000 00
Buildings,	–	–	–	–	8,000 00	38,800 00	12,000 00
Museum of Zoölogy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–	–
Williams College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Amherst College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Wesleyan Academy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–	–
Dukes County Academy,	–	–	–	–	–	–	–
New Salem Academy,	–	–	–	–	–	–	–
Worcester Polytechnic Institute,	–	–	–	–	–	–	–
New England Industrial School for Deaf Mutes,	2,000 00	2,000 00	2,000 00	2,000 00	2,000 00	–	100,000 00
Lowell Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
New Bedford Textile School: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
MISCELLANEOUS.							
Monuments, memorials, etc.,	7,200 00	500 00	–	18,600 00	400 00	2,500 00	1,000 00
Centennial expositions, etc.,	7,500 00	30,000 00	–	75,000 00	87,000 00	37,000 00	–
Towns and special items,	–	–	50,000 00	–	–	–	–
	$324,005 77	$414,116 87	$483,811 19	$297,522 93	$259,538 80	$258,657 27	$273,238 50

STATEMENT OF GRANTS AND ALLOWANCES, ETC. — Continued.

INSTITUTIONS, ETC.	1895.	1896.	1897.	1898.	1899.	1900.	1901.
CHARITABLE, ETC.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	–	–	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	25,000 00	25,000 00	25,000 00	35,000 00	35,000 00	55,000 00	57,000 00
Buildings,	–	60,000 00	25,000 00	3,000 00	1,000 00	–	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	20,000 00	20,000 00	25,000 00	25,000 00	25,000 00	25,000 00	25,000 00
Buildings,	–	100,000 00	–	–	–	–	–
Washingtonian Home,	–	–	–	–	–	–	–
Asylum for Discharged Female Prisoners,	–	–	–	–	–	–	–
Home for Friendless Women and Children,	–	–	–	–	–	–	–
New England Hospital for Women,	–	–	–	–	–	–	–
House of the Good Shepherd,	–	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	–	–	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	30,000 00	30,000 00	35,000 00	35,000 00	35,000 00	30,000 00	35,000 00
Buildings,	–	–	–	–	–	–	–
Hospital Cottages at Baldwinsville,	–	–	–	–	–	–	–
Carney Hospital,	–	–	–	–	10,000 00	–	–
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	15,000 00	–	–	–
Massachusetts State Firemen's Association,	10,000 00	10,000 00	10,000 00	10,000 00	10,000 00	10,000 00	10,000 00
EDUCATIONAL.							
Massachusetts Institute of Technology: —							
Maintenance,	–	31,000 00	29,000 00	29,000 00	29,000 00	29,000 00	29,000 00
Income from fund,	5,541 08	5,592 52	5,896 00	5,131 37	5,717 56	4,874 73	5,501 68

Massachusetts Agricultural College: —							
Income from fund,	11,082 16	11,185 02	11,791 97	10,262 72	11,435 12	9,749 45	11,003 34
General maintenance, etc.,	30,000 00	30,000 00	31,200 00	42,200 00	42,200 00	40,200 00	40,200 00
Buildings,	5,500 00	13,900 00	12,000 00	18,000 00	–	–	8,900 00
Museum of Zoölogy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–	–
Williams College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Amherst College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Wesleyan Academy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–	–
Dukes County Academy,	–	–	–	–	–	–	–
New Salem Academy,	–	–	–	–	–	50 00	50 00
Worcester Polytechnic Institute,	–	3,000 00	3,000 00	3,000 00	6,000 00	6,000 00	6,000 00
New England Industrial School for Deaf Mutes,	–	–	–	5,000 00	2,000 00	2,000 00	2,000 00
Lowell Textile School: —							
Maintenance,	–	–	–	15,000 00	18,000 00	16,000 00	18,000 00
Buildings,	25,000 00	–	–	–	–	35,000 00	35,000 00
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	25,000 00	–	35,000 00
New Bedford Textile School: —							
Maintenance,	–	–	–	–	–	18,000 00	18,000 00
Buildings,	–	–	–	25,000 00	–	–	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
Miscellaneous.							
Monuments, memorials, etc.,	10,000 00	64,000 00	500 00	33,500 00	–	28,600 00	32,300 00
Centennial expositions, etc.,	25,200 00	–	5,000 00	16,000 00	55,000 00	10,000 00	–
Towns and special items,	–	–	–	–	20,000 00	20,000 00	18,000 00
	$227,323 24	$433,677 54	$248,387 97	$355,094 09	$360,352 68	$369,474 18	$415,955 02

STATEMENT OF GRANTS AND ALLOWANCES, ETC. — Continued.

INSTITUTIONS, ETC.	1902.	1903.	1904.	1905.	1906.	1907.	1908.
CHARITABLE, ETC.							
Perkins Institution and Massachusetts School for the Blind: —							
Maintenance,	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	–	–	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —							
Maintenance,	–	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–	–
Massachusetts Charitable Eye and Ear Infirmary: —							
Maintenance,	25,000 00	30,000 00	30,000 00	30,000 00	30,000 00	35,000 00	35,000 00
Buildings,	–	–	–	–	–	–	–
Washingtonian Home,	–	–	–	–	–	–	–
Asylum for Discharged Female Prisoners,	–	–	–	–	–	–	–
Home for Friendless Women and Children,	–	–	–	–	–	–	–
New England Hospital for Women,	–	–	–	–	–	–	–
House of the Good Shepherd,	–	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	–	–	–	–	–
Massachusetts Soldiers' Home: —							
Maintenance,	35,000 00	30,000 00	30,000 00	50,000 00	60,000 00	60,000 00	63,000 00
Buildings,	–	–	–	50,000 00	50,000 00	75,000 00	25,000 00
Hospital Cottages at Baldwinsville,	–	–	–	–	–	–	–
Carney Hospital,	–	–	–	–	–	–	–
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	–	–	–	–
Massachusetts State Firemen's Association,	12,000 00	12,000 00	12,000 00	12,000 00	15,000 00	15,000 00	15,000 00
EDUCATIONAL.							
Massachusetts Institute of Technology: —							
Maintenance,	29,000 00	29,000 00	29,000 00	29,000 00	29,000 00	29,000 00	29,000 00
Income from fund,	5,071 02	5,178 11	5,875 07	4,998 52	3,481 68	7,131 68	5,306 68

Massachusetts Agricultural College: —							
Income from fund,	10,142 04	10,356 19	11,750 12	9,997 02	6,963 32	14,263 32	10,613 32
General maintenance, etc.,	40,200 00	42,000 00	53,500 00	53,500 00	174,933 28	62,500 00	99,117 04
Buildings,	71,200 00	20,820 00	3,900 00	52,650 00	73,300 00	47,400 00	55,000 00
Museum of Zoölogy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–	–
Williams College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Amherst College: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Wesleyan Academy: —							
Maintenance,	–	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–	–
Dukes County Academy,	50 00	50 00	50 00	50 00	–	–	–
New Salem Academy,	–	–	–	–	–	–	–
Worcester Polytechnic Institute,	6,000 00	6,000 00	6,000 00	10,000 00	10,000 00	10,000 00	10,000 00
New England Industrial School for Deaf Mutes,	4,500 00	2,500 00	2,500 00	2,500 00	3,500 00	3,500 00	3,500 00
Lowell Textile School: —							
Maintenance,	20,000 00	20,000 00	20,000 00	25,000 00	29,000 00	29,000 00	35,000 00
Buildings,	21,750 00	30,000 00	–	34,000 00	13,990 00	5,843 68	12,750 00
Bradford Durfee Textile School, Fall River: —							
Maintenance,	–	18,000 00	20,000 00	18,000 00	15,000 00	15,000 00	10,000 00
Buildings,	–	20,000 00	–	–	–	–	–
New Bedford Textile School: —							
Maintenance,	18,000 00	20,000 00	18,000 00	18,000 00	18,000 00	15,000 00	18,000 00
Buildings,	8,000 00	–	–	3,000 00	–	3,000 00	–
Northampton, for Smith's Agricultural School,	–	–	–	–	–	–	–
MISCELLANEOUS.							
Monuments, memorials, etc.,	13,000 00	28,800 00	–	25,000 00	500 00	14,500 00	15,000 00
Centennial expositions, etc.,	–	100,000 00	5,000 00	14,500 00	30,000 00	35,000 00	–
Towns and special items,	–	–	50,000 00	–	–	–	2,500 00
	$348,913 06	$454,704 30	$327,575 19	$472,195 54	$592,668 28	$506,138 68	$473,787 04

STATEMENT OF GRANTS AND ALLOWANCES, ETC. — Continued.

INSTITUTIONS, ETC.	1909.	1910.	1911.	1912.	1913.	1914.
CHARITABLE, ETC.						
Perkins Institution and Massachusetts School for the Blind: —						
Maintenance,	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00	$30,000 00
Buildings,	–	–	–	–	–	–
New Bedford Women's Relief Association,	–	–	–	–	–	–
Massachusetts School for the Feeble-minded: —						
Maintenance,	–	–	–	–	–	–
Buildings,	–	–	–	–	–	–
Massachusetts Charitable Eye and Ear Infirmary: —						
Maintenance,	35,000 00	35,000 00	45,000 00	45,000 00	45,000 00	45,000 00
Buildings,	–	–	–	–	–	–
Washingtonian Home,	–	–	–	–	–	–
Asylum for Discharged Female Prisoners,	–	–	–	–	–	–
Home for Friendless Women and Children,	–	–	–	–	–	–
New England Hospital for Women,	–	–	–	–	–	–
House of the Good Shepherd,	–	–	–	–	–	–
House of the Guardian Angel,	–	–	–	–	–	–
New England Female Moral Reform Society,	–	–	–	–	–	–
Massachusetts Soldiers' Home: —						
Maintenance,	85,000 00	147,000 00	96,000 00	95.000 00	92,000 00	96,000 00
Buildings,	–	–	–	–	–	2,200 00
Hospital Cottages at Baldwinsville,	–	–	–	–	–	–
Carney Hospital,	–	–	–	–	–	–
Massachusetts Homœopathic Hospital,	–	–	–	–	–	–
Woman's Charity Club,	–	–	–	–	–	–
Massachusetts State Firemen's Association,	15,000 00	15,000 00	15,000 00	15,000 00	15,000 00	15,000 00
EDUCATIONAL.						
Massachusetts Institute of Technology: —						
Maintenance,	29,000 00	29,000 00	29,000 00	100,000 00	100,000 00	100,000 00
Income from fund,	5,306 68	5,306 68	5,306 68	5,306 68	5,306 68	5,306 68

Massachusetts Agricultural College: —						
Income from fund,	10,613 32	10,613 32	10,613 32	10,613 32	10,613 32	10,613 32
General maintenance, etc.,	82,500 00	125,625 00	142,000 00	177,250 00	256,000 00	286,500 00
Buildings,	158,500 00	109,500 00	122,500 00	80,000 00	80,202 11	96,700 00
Museum of Zoölogy: —						
Maintenance,	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–
Tufts College, from Back Bay Lands fund,	–	–	–	–	–	–
Williams College: —						
Maintenance,	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–
Amherst College: —						
Maintenance,	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–
Wesleyan Academy: —						
Maintenance,	–	–	–	–	–	–
From Back Bay Lands fund,	–	–	–	–	–	–
Mt. Holyoke Female Seminary and College,	–	–	–	–	–	–
Dukes County Academy,	–	–	–	–	–	–
New Salem Academy,	–	–	–	–	–	–
Worcester Polytechnic Institute,	10,000 00	15,000 00	15,000 00	50,000 00	50,000 00	50,000 00
New England Industrial School for Deaf Mutes,	3,500 00	3,500 00	3,500 00	3,500 00	3,500 00	3,500 00
Lowell Textile School: —						
Maintenance,	35,000 00	37,500 00	40,000 00	40,000 00	73,000 00	45,000 00
Buildings,	18,000 00	34,000 00	29,655 00	18,338 00	–	15,000 00
Bradford Durfee Textile School, Fall River: —						
Maintenance,	25,000 00	27,000 00	27,000 00	27,000 00	40,500 00	20,000 00
Buildings,	10,000 00	–	26,000 00	22,000 00	–	6,922 25
New Bedford Textile School: —						
Maintenance,	18,000 00	18,000 00	20,000 00	20,000 00	30,000 00	24,000 00
Buildings,	29,000 00	65,000 00	–	–	17,500 00	15,700 00
Northampton, for Smith's Agricultural School,	7,000 00	7,000 00	9,743 00	8,260 74	8,512 38	8,582 99
MISCELLANEOUS.						
Monuments, memorials, etc.,	5,000 00	14,407 19	5,600 00	4,000 00	2,000 00	16,500 00
Centennial expositions, etc.,	–	–	–	15,000 00	50,000 00	131,000 00
Towns and special items,	–	–	–	180,000 00	8,000 00	155,000 00
	$611,420 00	$728,452 19	$671,918 00	$946,268 74	$917,134 49	$1,178,525 24

INSTITUTIONS, ETC.	1915.	1916.	Totals.
CHARITABLE, ETC.			
Perkins Institution and Massachusetts School for the Blind: —			
Maintenance,	$30,000 00	$30,000 00	$1,591,000 00
Buildings,	–	–	80,000 00
New Bedford Women's Relief Association,	–	–	1,500 00
Massachusetts School for the Feeble-minded: —			
Maintenance,	–	–	931,237 30
Buildings,	–	–	341,000 00
Massachusetts Charitable Eye and Ear Infirmary: —			
Maintenance,	45,000 00	45,000 00	1,044,000 00
Buildings,	–	–	120,000 00
Washingtonian Home,	–	–	59,000 00
Asylum for Discharged Female Prisoners,	–	–	26,000 00
Home for Friendless Women and Children,	–	–	12,000 00
New England Hospital for Women,	–	–	14,000 00
House of the Good Shepherd,	–	–	10,000 00
House of the Guardian Angel,	–	–	9,000 00
New England Female Moral Reform Society,	–	–	2,208 54
Massachusetts Soldiers' Home: —			
Maintenance,	105,000 00	97,265 00	1,636,265 00
Buildings,	4,250 00	6,800 00	263,250 00
Hospital Cottages at Baldwinsville,	–	–	95,000 00
Carney Hospital,	–	–	30,000 00
Massachusetts Homœopathic Hospital,	–	–	120,000 00
Woman's Charity Club,	–	–	25,000 00
Massachusetts State Firemen's Association,	15,000 00	15,000 00	333,000 00
EDUCATIONAL.			
Massachusetts Institute of Technology: —			
Maintenance,	100,000 00	100,000 00	1,489,040 00
Income from fund,	5,306 68	5,306 68	277,604 66

Massachusetts Agricultural College: —			
Income from fund,	10,613 32	10,613 32	553,394 70
General maintenance, etc.,	309,000 00	339,500 00	3,148,933 19
Buildings,	200,000 00	79,932 34	1,368,704 45
Museum of Zoölogy: —			
Maintenance,	–	–	243,500 00
From Back Bay Lands fund,	–	–	112,207 67
Tufts College, from Back Bay Lands fund,	–	–	50,000 00
Williams College: —			
Maintenance,	–	–	75,000 00
From Back Bay Lands fund,	–	–	25,000 00
Amherst College: —			
Maintenance,	–	–	2,500 00
From Back Bay Lands fund,	–	–	25,000 00
Wesleyan Academy: —			
Maintenance,	–	–	22,000 00
From Back Bay Lands fund,	–	–	25,298 04
Mt. Holyoke Female Seminary and College,	–	–	40,000 00
Dukes County Academy,	–	–	5,300 00
New Salem Academy,	–	–	10,000 00
Worcester Polytechnic Institute,	50,000 00	50,000 00	575,000 00
New England Industrial School for Deaf Mutes,	3,500 00	3,500 00	75,500 00
Lowell Textile School: —			
Maintenance,	50,780 80	50,000 00	616,280 80
Buildings,	15,000 00	1,500 00	344,826 68
Bradford Durfee Textile School, Fall River: —			
Maintenance,	22,000 00	30,000 00	314,500 00
Buildings,	2,000 00	7,500 00	154,422 25
New Bedford Textile School: —			
Maintenance,	27,000 00	27,000 00	345,000 00
Buildings,	–	–	166,200 00
Northampton, for Smith's Agricultural School,	10,000 00	8,847 85	67,946 96
MISCELLANEOUS.			
Monuments, memorials, etc.,	3,000 00	4,000 00	440,907 19
Centennial expositions, etc.,	69,000 00	25,000 00	973,600 00
Towns and special items,	2,500 00	–	696,942 99
	$1,078,950 80	$936,765 19	$18,988,070 42 [1]

[1] Total: Charitable, etc., $6,743,460.84; Educational, $10,133,159.40; Miscellaneous, $2,111,450.18.

Summary by Years of Grants and Allowances by the Legislature to Sundry Institutions, etc., from 1860 to 1916, inclusive.

Date.	Charitable, etc.	Educational.	Miscellaneous.	Total.
1860,	$26,500 00	$22,000 00	–	$48,500 00
1861,	34,500 00	71,642 00	–	106,142 00
1862,	29,108 54	3,500 00	–	32,608 54
1863,	25,500 00	509,196 04	$600 00	535,296 04
1864,	31,500 00	22,707 67	–	54,207 67
1865,	43,000 00	20,121 92	3,500 00	66,621 92
1866,	51,000 00	–	–	51,000 00
1867,	51,100 00	10,000 00	12,500 00	73,600 00
1868,	72,500 00	156,683 80	–	229,183 80
1869,	110,000 00	173,553 28	–	283,553 28
1870,	118,500 00	82,259 74	–	200,759 74
1871,	67,000 00	123,728 43	1,650 00	192,378 43
1872,	54,000 00	17,306 61	30,000 00	101,306 61
1873,	58,000 00	47,389 32	15,000 00	120,389 32
1874,	60,000 00	96,955 62	101,942 99	258,898 61
1875,	59,000 00	21,449 26	68,000 00	148,449 26
1876,	56,500 00	29,507 30	8,100 00	94,107 30
1877,	67,500 00	20,679 14	–	88,179 14
1878,	64,000 00	26,395 48	10,000 00	100,395 48
1879,	56,500 00	51,080 17	–	107,580 17
1880,	56,500 00	13,829 80	250 00	70,579 80
1881,	62,500 00	18,155 77	44,000 00	124,655 77
1882,	62,000 00	35,897 67	55,000 00	152,897 67
1883,	72,500 00	32,664 24	5,000 00	110,164 24
1884,	65,770 08	68,732 76	12,500 00	147,002 84
1885,	66,188 41	41,398 29	800 00	108,386 70
1886,	87,077 26	94,297 04	13,500 00	194,874 30
1887,	132,526 45	36,752 55	50,500 00	219,779 00
1888,	151,142 76	158,163 01	14,700 00	324,005 77
1889,	275,103 61	108,513 26	30,500 00	414,116 87
1890,	336,928 73	96,882 46	50,000 00	483,811 19
1891,	155,000 00	48,922 93	93,600 00	297,522 93
1892,	115,000 00	57,138 80	87,400 00	259,538 80
1893,	136,000 00	83,157 27	39,500 00	258,657 27
1894,	115,000 00	273,238 50	1,000 00	273,238 50
1895,	115,000 00	77,123 24	35,200 00	227,323 24
1896,	275,000 00	94,677 54	64,000 00	433,677 54
1897,	150,000 00	92,887 97	5,500 00	248,387 97
1898,	153,000 00	153,594 09	49,500 00	355,094 09
1899,	146,000 00	139,352 68	75,000 00	360,352 68
1900,	150,000 00	160,874 18	58,600 00	369,474 18
1901,	157,000 00	208,655 02	50,300 00	415,955 02
1902,	102,000 00	233,913 06	13,000 00	348,913 06
1903,	102,000 00	223,904 30	128,800 00	454,704 30
1904,	102,000 00	170,575 19	55,000 00	327,575 19
1905,	172,000 00	260,695 54	39,500 00	472,195 54
1906,	185,000 00	377,168 28	30,500 00	592,668 28
1907,	215,000 00	241,638 68	49,500 00	506,138 68
1908,	168,000 00	288,287 04	17,500 00	473,787 04
1909,	165,000 00	441,420 00	5,000 00	611,420 00
1910,	227,000 00	487,045 00	14,407 19	728,452 19
1911,	186,000 00	480,318 00	5,600 00	671,918 00

Summary by Years of Grants and Allowances by the Legislature to Sundry Institutions, etc., from 1860 to 1916, inclusive — Concluded.

Date.	Charitable, etc.	Educational.	Miscellaneous.	Total.
1912, . . .	$185,000 00	$562,268 74	$199,000 00	$946,268 74
1913, . . .	182,000 00	675,134 49	60,000 00	917,134 49
1914, . . .	188,200 00	687,825 24	302,500 00	1,178,525 24
1915, . . .	199,250 00	805,200 80	74,500 00	1,078,950 80
1916, . . .	194,065 00	713,700 19	29,000 00	936,765 19
Total, . .	$6,743,460 84	$10,133,159 40	$2,111,450 18	$18,988,070 42

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BULLETIN No. 18

THE CONSTITUTIONALITY OF SOCIAL WELFARE LEGISLATION

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THE CONSTITUTIONALITY OF SOCIAL WELFARE LEGISLATION.

Introduction.

A Justice of the Federal Supreme Court has lately said that our democracy has deepened recently and that the highest courts are adopting the rule of "social justice" as a substitute for "technical legal justice." On March 19 and April 9 of this year the Supreme Court of the United States rendered decisions of unusual interest and far-reaching importance upon the subject of social welfare legislation.[1]

These decisions show that the present tendency of the court of last resort in this country is to uphold the right of the legislature to enact social welfare measures regardless of the sex of the immediate beneficiary. This is done under the police power which is the power to legislate in behalf of the public health, morals or safety by general regulations reasonably adapted to the end in view and not creating any arbitrary discrimination between different classes of men or things. The characteristics of the police power are generally stated to be (1) that it act in the form of a restriction and (2) that it pertain to the public health, morals or safety.[2] The conception of the proper range of the police power has in recent years been much broadened, and many legislative measures having only a slight connection with the public health, morals or safety have been upheld on the ground that the police power extends to the promotion of the general welfare.[3] The police power, in its broadest sense, may be said to include all legislation and almost every function of civil government. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest.

[1] Wilson *v.* New (Adamson Eight-hour law), (1897), 243 U. S. 332; Bunting *v.* Oregon (1917), 243 U. S. 426.

[2] Nichols, *The Law of Eminent Domain*, 2d. ed., II., 53, 54.

[3] Numerous cases of this kind are cited in Evans, *Leading Cases on American Constitutional Law*, 413.

As stated by Mr. Justice Day, who spoke for the Federal Supreme Court in Sligh *v.* Kirkwood, 237 U. S. 52, at page 59: "It (police power) embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. . . . In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined in general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.' . . . And further: 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' "

The assertion by a State of its police power is frequently challenged by the claim of "liberty" as safeguarded by the Fourteenth Amendment to the Constitution of the United States. In 1916 the United States Supreme Court had occasion to consider anew the scope of the police power, and the boundaries which the Fourteenth Amendment imposes.

In Rast *v.* Van Beman & Louis Co., 240 U. S. 342, 357, the court said: "It is the duty and function of the legislature to discern and detect evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. . . . But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance."

The actual words of the Fourteenth Amendment are these: "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the Constitution of Massachusetts, Part the First, Art. XII, are the words: "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the

law of the land." The police power must be exercised subject to the foregoing provisions of both the Federal and the State Constitutions; and the law passed in the exercise of such power must tend toward the preservation of the lives, the health, the morals and the welfare of the community. Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner.

The fundamental distinction between police power and eminent domain is that in the latter property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public. In the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him, because his use or enjoyment of such property is injurious to the public welfare.[1] In determining whether social legislation is justified resource is usually had to the police power of the State. The Legislature must determine whether the necessity exists to correct certain evils.

Among the important subjects that are affected by police power regulations are the following: —

I. Limitation of the Hours of Labor.
II. Minimum Wage Legislation.
III. Sale of Fuel by Municipalities.
IV. Regulation of Trades and Professions.
V. Pure Food Laws.
VI. Social Insurance.

I. Limitation of the Hours of Labor.

A. Regulation of Labor of Women and Children.

The subject of the hours of labor of employed persons has been legislated upon for many years and for a variety of reasons. The earliest laws on the subject dealt with the employment of children, later including women in their scope.

[1] Nichols, *The Law of Eminent Domain*, 2d ed., I, 54.

The basis of such laws was primarily that the individuals affected were wards of society, but later decisions as to women had regard for the functions of motherhood and the dependence of the nation for its future welfare upon the conservation of the health of its women.[1] In the language of Mr. Chief Justice Rugg in Commonwealth *v.* John T. Connor Co., 222 Mass. 299, 301, "The constitutionality of statutes limiting the hours of labor of women has been upheld, commonly on the ground that woman is under an industrial disability by reason of sex, that her physical structure and the duty of maternity place her at a disadvantage, that her strength and vitality are likely to be impaired by confining and exacting labor under adverse conditions, and that thus the public welfare is injured by affecting deleteriously the vigor of mothers and through them the virility of the race. . . . This reasoning applies quite as strongly where the labor is not purely physical but is also mental."

In 1876 the Massachusetts Supreme Judicial Court, in the case of Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383, sustained a law prohibiting the labor of women and children for more than sixty hours per week in manufacturing establishments. In 1912 the Massachusetts Supreme Judicial Court held that the provisions of St. 1909, Chap. 514, Sec. 48, limiting the time during which women and children may be employed in manufacturing and mechanical establishments to fifty-six hours in each week and to ten hours in each day "unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week," etc., were constitutional. Commonwealth *v.* Riley, 210 Mass. 387. At page 390 Mr. Chief Justice Rugg said: "The constitutionality of a statute restricting the hours of employment of women and children in a single manufacturing service was upheld in 1876 by this Court. . . . There can be no doubt as to the constitutionality of such a statute in its application to minors, who are not *sui juris*, and are in some respects wards of the State . . . (page 391). Whatever may be the bounds fixed by the natural and constitutional rights to freedom of all individuals, including women, to the power of the Legislature to determine maximum

[1] Muller *v.* Oregon (1908), 208 U. S. 412.

hours of labor for women, it is clear that the present statute does not transgress those bounds." This decision was affirmed in 1914 by the Federal Supreme Court.[1]

In 1915 the provision of St. 1913, Chap. 758, that "no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company more than ten hours in any one day; and in no case shall the hours of labor exceed fifty-four in a week . . ." was construed by the court in Commonwealth *v.* John T. Connor Company, *supra.* The constitutionality of that statute was not questioned, but there is a valuable statement by Chief Justice Rugg of the grounds on which the constitutionality of statutes limiting the hours of labor has been upheld.

The Federal Supreme Court in Muller *v.* Oregon, 208 U. S. 412, sustained the constitutionality of a ten-hour law for women in any mechanical establishment or factory or laundry.

In 1914 the same court in Sturges *v.* Beauchamp, 231 U. S. 320, sustained the Illinois Child Labor Law as an exercise "of the protective power of government." The same year (1914) the Federal Supreme Court sustained an Ohio nine-hour statute. Hawley *v.* Walker, 232 U. S. 718.

In 1915 the United States Supreme Court in Miller *v.* Wilson, 236 U. S. 373, and in Bosley *v.* McLaughlin, 236 U. S. 385, sustained the extremest regulations of hours of labor for women to date — California statutes limiting the labor of women in certain pursuits to forty-eight hours per week. Mr. Justice Hughes, speaking for the court at page 382 in Miller *v.* Wilson, *supra,* said: "It is manifestly impossible to say that the mere fact that the statute of California provides for an eight-hour day, or a maximum of forty-eight hours a week, instead of ten hours a day or fifty-four hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the *reasonable* exertion of protective authority has been overstepped."

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[1] Riley *v.* Massachusetts (1914), 232 U. S. 671.

The New York Court of Appeals in People *v.* Schweinler, 214 N. Y. 395 (1915), sustained a statute prohibiting night work for women and with courageous frankness expressly overruled People *v.* Williams, 189 N. Y. 131.[1] At page 401 the court said: "Impairment caused by exhaustion or even ordinary weariness must be repaired by normal and refreshing sleep and rest if health and efficiency are to be preserved." "Surely it is a matter of vital import to the State that the health of thousands of women working in factories should be protected and safeguarded from any drain which can reasonably be avoided. This is not only for their own sakes, but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called upon to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken-down mothers."

B. Regulation of Labor in Dangerous Employments.

It is evident that the grounds for laws affecting adult males must differ from those controlling in the regulations solely for women and children, and the movement for general regulations of this nature has been extremely slow. Beginning with mines (Maryland, 1884, Wyoming, 1889) legislation was addressed to an industry in which there were peculiar hazards to life and health which have secured for those employed in it a quite general restriction to an eight-hour day. Such laws are constitutional (Holden *v.* Hardy [1898], 169 U. S. 366), not because of their effect on the public welfare in its larger aspect, but because they protect the individual workman from the injurious effects of protracted hours of labor under unhealthful conditions. Such laws are valid, therefore, rather as health than as labor laws.

Railroad employment next came under legislative direction, beginning with Minnesota (1885) and Ohio (1890). The Ohio statute was declared unconstitutional by a subordinate court (no appeal apparently having been taken), on the same grounds that the Supreme Court of Colorado rejected a law of that

[1] See article by Professor Frankfurter, entitled "Hours of Labor and Realism in Constitutional Law," *Harvard Law Review*, XXIX, 353.

State dealing with employees in mines, *i.e.*, that such laws interfere with private business and the right of individuals to control their own affairs. However, the safety of the public no less than the welfare of the employees is involved in legislation limiting the hours of labor on railroads, and Congress has acted (1907) to restrict the hours of service that may be required or permitted where the movement of trains is involved, this act being held to be within the power of Congress. Baltimore & Ohio R.R. Co. *v.* Interstate Commerce Commission (1911), 221 U. S. 612.[1]

In this Commonwealth there is a statute limiting hours of employment for street railway employees (St. 1913, Chap. 833), but its constitutionality has never been passed upon. In 1902 there was an advisory opinion of the justices of the Rhode Island Supreme Court declaring constitutional a ten-hour statute for employees operating street railways. (1902) *Re* Ten Hour Law for Street Railway Corporations, 24 R. I. 603.

C. Regulations of Hours of Labor in General.

The Massachusetts Supreme Court in 1915, in Commonwealth *v.* Boston & Maine R.R., 222 Mass. 206, was called upon to consider the constitutionality of the following provision (St. 1914, Chap. 746): "Employees in and about steam railroad stations in this Commonwealth designated as baggagemen, laborers, crossing tenders and the like, shall not be employed for more than nine working hours in ten hours' time; the additional hour to be allowed as a lay-off." The court followed Lochner *v.* New York, 198 U. S. 45,[2] and held that the statute was in violation of the Fourteenth Amendment to the Constitution of the United States as an unwarranted interference with freedom of contract in regard to the hours of labor in an ordinarily healthy occupation.

Mr. Chief Justice Rugg, speaking for the court at page 208, said: "The main contention of the defendant is that the statute as thus construed is unconstitutional. The agreed facts show that there is nothing inherently unhealthy about the work which the employee did. It was performed half in

[1] See Wilson *v.* New (Adamson Eight-hour law), *supra.*

[2] See Bunting *v.* Oregon, *supra.* The later decision is now the authoritative guide for State and Federal courts.

the open air. It was not arduous. Under these circumstances, the case at bar is indistinguishable from and is governed by Lochner *v.* New York, 198 U. S. 45. It there was held that a statute which prohibited labor for more than ten hours per day in an ordinarily healthy occupation was 'an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts,' and that 'Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.' That decision is binding upon the Legislature and courts of this Commonwealth. See also Opinion of the Justices, 208 Mass. 619, 622. The instant statute is indistinguishable in principle from the one there stricken down. That it relates in part to certain employees of railroads constitutes no ground for differentiation, for the class with which it deals, namely, 'baggagemen,' 'laborers' and 'the like,' groups together those whose work does not have relation to the operation of trains and the safety of passengers. It refers to those employed in different capacities in and about railroad stations, whose work does not concern the safety of the traveling public. Whether other considerations might arise as to crossing-tenders, if they stood alone, need not be discussed, for the dominating classification of the statute is of employees whose work has no direct relation to the security of those who travel by railroad. The conclusion that such a statute as that here presented is an unwarranted interference with individual liberty and an interference with property rights, and therefore contrary to constitutions which secure these fundamental rights, is supported by numerous decisions in other jurisdictions, most of them antedating the Lochner case, which is decisive and to the same effect.

"Statutes limiting the hours of labor of employees of the Commonwealth, counties, cities and towns, Woods *v.* Woburn, 220 Mass. 416, Atkin *v.* Kansas, 191 U. S. 207, and of women and children, Commonwealth *v.* Hamilton Manuf. Co., 120 Mass. 383, Commonwealth *v.* Riley, 210 Mass. 387, affirmed in 232

U. S. 671, are upheld for quite different reasons, and without conflicting with the Lochner case."

Since the foregoing case was decided the United States Supreme Court, upon April 9, 1917, has rendered its decision in Bunting *v.* Oregon, 37 Sup. Ct. 435, declaring constitutional a statute of the State of Oregon which provided that "no person shall be employed in any mill, factory, or manufacturing establishment in this State more than ten hours in any one day except watchmen and employees when engaged in making necessary repairs or in case of emergency where life or property is in imminent danger." While this recent case does not in terms expressly overrule the Lochner case, which the Massachusetts Supreme Court felt bound to follow, it is clearly beyond discussion that the Bunting case has replaced it and must be taken as a guide for subordinate and State courts in the future. In the Lochner case Justices Holmes and Harlan wrote dissenting opinions, Justices White and Day concurring. Mr. Justice Holmes expressed the view that the majority had decided the case "upon an economic theory which a large part of the country does not entertain." Mr. Justice Brandeis took no part in the consideration and decision of the Bunting case, as he had prepared a portion of the brief upon behalf of the State of Oregon. The Bunting case sustains the extremest regulation of hours of labor, with respect to persons of both sexes, to date.

II. Minimum Wage Legislation.

"It is only in recent years that the idea has gained a footing that the State might intervene to determine whether or not the earnings of an employee were inadequate for the reasonable maintenance of physical conditions, though this would seem to be not a very wide step from the consideration of the effect of long and exhausting hours of service upon health. However, the general regulation of the wage payment by statute has never been attempted in this country in private employments, in so far as the amounts to be paid the adult males are concerned; while for women and children only a few States have established a minimum wage by law, beginning with Massachusetts in 1912, eight other States following in 1913." *Monthly*

Review of the U. S. Bureau of Labor Statistics, IV. 687 (No. 5, May, 1917).

The Massachusetts Minimum Wage provision will be found contained in Acts 1912, Chap. 706. There has been no constitutional determination of that legislation by the Massachusetts Supreme Court.

The constitutionality of the Oregon Minimum Wage Law was challenged as being beyond the police power of the State and as violating due process of law. Stettler *v.* O'Hara (1914), 69 Or. 519; Simpson *v.* O'Hara (1914), 69 Or. 93. The Oregon Supreme Court in the Stettler case said: "We think we should be bound by the judgment of the Legislature that there is a necessity for this act, that it is within the police power of the State to provide for the protection of the health, morals and welfare of women and children and that the law should be upheld as constitutional." These cases subsequently were argued before the United States Supreme Court, Mr. Louis D. Brandeis, now one of the Justices, appearing upon the brief in favor of the law. Mr. Justice Brandeis not voting, the eight remaining members of the court divided equally, thus sustaining the decisions of the Supreme Court of the State.[1]

In Australia power is lodged in the Commonwealth Court to fix a minimum wage for men in all cases of interstate disputes.[2] Great Britain passed the first minimum wage act in 1909. It provided for trade boards after the plan of Australian legislation and applied to the tailoring, lace-making, box and chain-making industries. The Board of Trade was authorized to select a chairman and secretary and to appoint not more than one half of the members of each special trade board. If women were employed it was necessary to include a woman on the trade board. The specific duty of these wage boards was to fix a wage for time and piece work in each industry. The English coal strike of 1912 resulted in the passage of a minimum wage law applying to coal miners. The act provided for district boards to determine rates of wages in different parts of the country.

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[1] 243 U. S. 629.

[2] See 4 Commonwealth Arbitration Reports, 101.

III. Sale of Fuel by Municipalities.

Under the rule that a municipality cannot enter into a commercial enterprise it has been held that it cannot buy and sell coal to its citizens as a business, thereby entering into competition with dealers in coal, inasmuch as such use of moneys is not for a public purpose, Opinion of Justices, 155 Mass. 601; *Re* Municipal Fuel Plants, 182 Mass. 605. On the other hand, it seems that a municipality may establish fuel or coal yards for the purpose of selling to the inhabitants of the municipality or to others in "an extraordinary emergency," as where persons desiring to purchase fuel cannot supply themselves through private enterprise; and in such a case the city may constitute itself an agent for the relief of the community, in which case money expended for the purpose would be expended for the public use. *Re* Municipal Fuel Plants, 182 Mass. 605; McQuillin, Municipal Corporations, IV, Sec. 1809. Mr. Justice Loring in 182 Mass. (*supra*) separately stated as his opinion that the conditions contemplated by the other justices as creating an emergency which would justify legislation authorizing temporary relief could not exist, and therefore that the remedy is purely theoretical and should not be considered. Since that time (1903) there has been such an extraordinary rise in prices of commodities, including coal (the latter article has recently been under governmental investigation), as to cast doubt upon Justice Loring's statement.

IV. Regulation of Trades and Professions.

It is clearly within the police power of the State to regulate any trade or business where the health and general welfare of the people require it, provided this power is not exerted arbitrarily or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Reasonable regulations respecting professional qualifications are invariably upheld because they do not contravene any provision of the State or Federal Constitution. While such regulations are subject to judicial scrutiny upon fundamental grounds, "yet a considerable latitude

of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment." Reinman *v.* Little Rock, 237 U. S. 171, 177. The principles pertaining to the exercise of the police power as applied to the regulating of trade or business have been considered in the following recent cases: —

Plumbers: Commonwealth *v.* McCarthy (1916), 225 Mass. 192, 196.
Practice of medicine: Commonwealth *v.* Zimmerman (1915), 221 Mass. 185, 187.
Plumbers: Commonwealth *v.* Beaulieu (1912), 213 Mass. 138, 142.
Advertising for employees during strike: Commonwealth *v.* Libbey (1914), 216 Mass. 356.
Theatrical exhibitions: Commonwealth *v.* McGann (1913), 213 Mass. 213.
Practice of medicine: Commonwealth *v.* Porn (1907), 196 Mass. 326.
Restaurants conducted by Chinese: Opinion of Justices (1911), 207 Mass. 601.
Gift enterprises: Opinion of Justices (1911), 208 Mass. 607.
Employment agencies: Brazee *v.* Michigan (1915), 241 U. S. 340.
Hotel keepers: Miller *v.* Strahl (1915), 239 U. S. 426.
Drummers: Williams *v.* Arkansas (1910), 217 U. S. 79.
Weighing of coal: McLean *v.* Arkansas (1907), 211 U. S. 539.

V. Pure Food Laws.

The right to prevent the sale of impure food, to inspect food, or even destroy it when found impure, rests upon the police power of the State, and is in no way impaired by the Federal Constitution. Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It is a legislative prerogative to determine whether a certain article of food is detrimental to the health of the inhabitants of the State, and with that determination the courts cannot interfere.[1] But the Legislature cannot forbid the sale of wholesome food. "I imagine," said

[1] See Thornton, *The Law of Pure Food and Drugs*, 5–8 and cases cited.

Mr. Justice Cullen, speaking for the New York Court of Appeals, "that the sale and consumption of a well-known article of food could not be forbidden by the Legislature even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid, must be within reasonable limits." [1] Not only has the Legislature the power to protect the health of the inhabitants of a State, but it may prevent deception in the sale of food. This is forcibly illustrated by legislation that prevents the use of coloring matter in oleomargarine. Statutes of this nature have been universally upheld. Plumley *v.* Massachusetts, 155 U. S. 461,[2] affirming 156 Mass. 236.[2] See Commonwealth *v.* Wheeler, 205 Mass. 384, 386; Commonwealth *v.* Dreeb, 208 Mass. 493; Commonwealth *v.* Vieth, 155 Mass. 442; Commonwealth *v* Evans, 132 Mass. 442."

The foregoing cases sustain the validity of statutes respecting the sale of milk.

Pure food statutes are not in violation of the Fourteenth Amendment. Powell *v.* Commonwealth, 127 U. S. 678; North Am. Cold Storage Co. *v.* Chicago, 211 U. S. 306.

The Legislature may make the sale of mixed pure milk and water an offense. Commonwealth *v.* Waite, 11 Allen, 264. *Vide* Commonwealth *v.* N. E. Maple Syrup Co., 217 Mass. 432; Commonwealth *v.* Warren, 160 Mass. 533; Commonwealth *v.* Raymond, 97 Mass. 567; Commonwealth *v.* Gray, 150 Mass. 327; Salem *v.* Eastern R.R., 98 Mass. 431; Miller *v.* Horton, 152 Mass. 540; Stone *v.* Heath, 179 Mass. 385; Commonwealth *v.* Ryberg, 177 Mass. 67.

The regulation of the practice of pharmacy and of the sale of drugs and poisons comes peculiarly within the province of the police power of the State.

The State cannot, under cover of exerting its police powers in regulating the sale of food, undertake what amounts essen-

[1] People *v.* Biesecker (1901), 169 N. Y. 53, 57.

[2] A leading case in which the doctrine of Leisy *v.* Hardin (1890), 135 U. S. 100, was distinguished. Upon the general question of the validity of police regulations as to branding or labeling articles of commerce a valuable note will be found in 40 L. R. A. (N. S.), 875.

tially to a regulation of interstate commerce or impose a direct burden upon that commerce.[1] "There is, however," says Chief Justice Rugg in Commonwealth *v.* Moore, 214 Mass. 19, 25, "a large class of State laws which have been upheld as valid police regulations, although incidentally they bear upon interstate commerce. If such statutes are a genuine exercise of the police power, are general in their operation, and have a rational connection with the end to be accomplished of protecting and promoting the public health, they will be sustained, even though they may affect or burden interstate commerce in some respects."

VI. Social Insurance.

A. Compulsory Health Insurance.

At present the United States is the only great industrial nation without compulsory health insurance. Germany inaugurated the movement in 1883 under the leadership of Bismarck. Professor Irving Fisher of Yale, President of American Association for Labor Legislation, says: "This act was the first step in her (Germany's) program of social legislation. Her wonderful industrial progress since that time, her comparative freedom from poverty, reduction in the death rate, advancement in hygiene, and the physical preparedness of her soldiery, are presumably due, in considerable measure, to health insurance. Since 1883, health insurance was adopted successively by Austria, Hungary, Luxemburg, Norway, Serbia, Great Britain, Russia, Rumania and Holland. . . . Indemnification is the essence of the insurance principle. It spreads the loss of each person in a group over them all. For each individual it converts large fluctuating haphazard losses into small regular and certain costs. Insurance aims to reduce fluctuations — to make the income stream more steady. It was more economical to pay a little premium for fire insurance each year than to suffer a big loss when the fire comes. This insurance principle is of the greatest importance in economics and in business. The well-to-do have long made use of it in fire insurance, marine insurance, life insurance, . . . and to some extent accident and health insurance. The capitalist has long endeavored to elimi-

[1] Savage *v.* Jones (1912), 225 U. S. 501, 524.

nate, or at least to reduce, every determinable risk. But the curious and melancholy fact is that outside of workmen's compensation, the poor in this country have received, as yet, very little benefits from the application of the insurance principle. Yet it is the poor whose need of health insurance is greatest, and for two important reasons. One is that the worker is more likely to lose his health than the capitalist; for it is well known from several lines of research that the death rate, and therefore sickness rate, prevailing among the poor is from two to three times that prevailing among the well-to-do. The other reason is that any loss from sickness is a far more vital matter to the poor than to the rich. The workman who loses his health loses his chief asset. That low-paid workmen seldom insure against illness is undoubted." [1]

In his inaugural address to the Legislature on January 4, 1917, Governor McCall said: "I am strongly of the opinion that there is no form of social insurance that is more humane, sounder in principle, and that would confer a greater benefit upon large groups of our population and upon the Commonwealth as a whole than health insurance."

On January 25, 1917, the State Commission appointed by Governor Johnson of California to investigate social insurance made its report to the Legislature. This report from the first official commission of its kind in America is of especial interest and significance.

After a preliminary survey of the social insurance field the Commission agreed to centre all efforts upon health insurance as the logical and most practicable next step following workmen's compensation. Briefly, aside from clear recognition of the urgent need for health insurance, the findings and recommendations of the Commission are summed up in a unanimous agreement upon the essential provisions as given in the following sentence: —

In order to meet the problems of destitution due to sickness, and in order to make health insurance a valuable adjunct to the broad movement for the conservation of public health, any legislation on this subject should, in the opinion of the Commission, provide (*a*) for a compulsory system for the conducting of the insurance by non-profit making insurance

[1] *American Labor Legislation Review*, VII, No. 1 (March, 1917).

carriers; (*b*) for a thorough adequate provision for the care and treatment of the sick, and (*c*) for contributions from the insured, from industry and from the State.

This report was indorsed by Governor Johnson in his message to the Legislature in January, 1917, and a constitutional amendment has been passed to pave the way for legislative action upon this subject.[1]

On February 12, 1917, the Special Commission on Social Insurance appointed by Governor McCall of Massachusetts reported to the Legislature. This is the second official commission report of the kind made in this country. The Massachusetts Commissioners attempted to cover in one brief investigation the several forms of social insurance, and it is not surprising that the sub-committees dealing with sickness, old age dependency, and unemployment arrived at conclusions not entirely acceptable to all the members of the Commission. In indorsing the principle of health insurance, however, the Commission is unanimous. A majority of the members are furthermore in accord with the main provisions of the health insurance bill introduced in the 1917 session of the Massachusetts Legislature, and believe that the system, to be effective, must be compulsory, and that the cost should be distributed among employer, employee and the State.

The major report, submitted by the sub-committee on health insurance, was signed by four Commissioners, including the Chairman of the Commission. Briefly, the report in its recommendations agrees in most particulars with the conclusions reached independently on the opposite coast by the California Commission. The Massachusetts report recommends compulsory contributory workmen's health insurance legislation, with private stock companies operating for profit excluded from the field.[2]

A special recess committee for further investigation has been ordered.

Bills have been introduced or re-introduced since the beginning of the year in New York, New Jersey, Connecticut, Maine, Ohio, Michigan, Wisconsin, Rhode Island, New Hampshire, Washington and Missouri.

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[1] See *American Labor Legislation Review*, VI, 208.

[2] See *Report of the Special Commission on Social Insurance*, February, 1917.

The theory of social insurance is based upon the public needs and the public welfare, and assumes that the accidents and disabilities which occur arise from contingencies not within the control of the parties affected and have so many cumulative and joint causes that they have no immediate relation to the conduct of the parties. They are social in their origin, rather than individual, so that the losses should be spread over the entire industry, or to the entire members of society, for which society should be taxed so as to relieve the social and financial shock of those immediately affected. It is asserted with apparent confidence that this theory springs from the idea that it is the duty of society to relieve misfortune, sickness and premature old age, and for this reason the tax should be collected for that purpose on the law of average, without regard to faults or terms of employment. This theory underlies all forms of State insurance or social insurance.

The serious question is whether these economic theories have the sanction of law, or, in other words, does the police power of the State permit legislation of the character of State health insurance? "Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation." [1]

In the case of Noble State Bank *v.* Haskell, 219 U. S. 104, 110, Mr. Justice Holmes said: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Law is a progressive science and must be construed to meet the emergencies of to-day. The courts recognize that public sentiment must make law and that courts must interpret the law in accordance with the spirit of the times. But there are certain State and Federal constitutional restrictions that must be reckoned with.

To sustain the constitutional right to enact compulsory health insurance legislation, much reliance is placed upon the various workmen's compensation acts in this country. When carefully analyzed it will be seen that in the majority of in-

[1] Justice Brewer in *Re* Debs (1895), 158 U. S. 564.

stances the Legislature has made workmen's compensation legislation *elective* rather than *compulsory*, and in sustaining the validity of the former the courts have attached importance to the fact that the employer was under no legal compulsion to accept the provisions of the act. Opinion of Justices, 209 Mass. 607; Young *v.* Duncan, 218 Mass. 346; Jeffrey Mfg. Co. *v.* Blagg, 235 U. S. 571. It is true that in the foregoing cases the courts were careful to refrain from stating any opinion as to whether this non-compulsory feature of the legislation was necessarily of controlling importance, but it is equally true that considerable importance was attached to the fact that the legislation was optional. On the other hand the New York Court of Appeals, in a much criticised decision (Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271), declared a compulsory workmen's compensation act unconstitutional. Subsequently the New York Constitution was amended and the New York Court of Appeals consequently upheld the validity of a workmen's compensation act that contained certain compulsory features, Matter of Jensen, 215 N. Y. 514. A few courts have held that compulsory compensation acts are constitutional even in the absence of constitutional amendments, Raymond *v.* Chicago Ry. Co., 233 Fed. 169; (Washington Act) Stoll *v.* Pacific Coast S. S. Co., 205 Fed. 169; (Washington Act) State *v.* Mountain Timber Co., 75 Wash. 581; American Coal Co. *v.* Alleghany County Commons, 128 Md. 564. In California (1914) there was a constitutional amendment that permitted a compulsory compensation act.[1]

Without inquiring too curiously whether the Massachusetts Supreme Court would uphold the constitutionality of a compulsory workmen's compensation act in the absence of a constitutional amendment, it seems proper to state that social insurance legislation, if compulsory, would be best safeguarded by an express constitutional amendment. It is significant that in the State of California such an amendment has recently been passed to pave the way for legislation of this kind. Of course even an amendment to the State constitution would not be necessarily conclusive, because the further question would arise as to whether such legislation violated the Fourteenth Amendment

[1] *Report of Commission on Industrial Relations*, VI, 5413.

to the Federal Constitution. See Noble State Bank *v.* Haskell, 219 U. S. 104; Matter of Jensen *v.* So. Pacific R.R., *supra.*

But all doubt on this point seems to have been removed by the decision of the Federal Supreme Court in New York Central R.R. Co. *v.* White, 243 U. S. 188, decided March 6, 1917. The Federal Supreme Court unanimously held that the New York compulsory workmen's compensation act to which reference has been made in this summary is not repugnant to the provisions of the Fourteenth Amendment.

B. Old Age Pensions and Unemployment Insurance.

As neither of these forms of social welfare legislation have ever been adopted in any of the States, the question of legislative authority has never been presented to the courts, but the following passage from Mr. Justice Pitney's opinion in the very recent case of Mountain Timber Co. *v.* Washington[1] (March 6, 1917), where the Federal Supreme Court upheld the Washington Compulsory Workmen's Compensation Act, is of such importance from the point of view of social insurance projects that it deserves extensive quotation. At page 238 he said: "The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. Lawton *v.* Steele, 152 U. S. 133, 136. 'The police power of a State is as broad and plenary as its taxing power.' Kidd *v.* Pearson, 128 U. S. 1, 26. In Barbier *v.* Connolly, 113 U. S. 27, 31, the court, by Mr. Justice Field, said: 'Neither the (fourteenth) amendment, — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often

[1] Mountain Timber Company *v.* Washington (1917), 243 U. S. 219.

be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' It seems to us that the considerations to which we have adverted in New York Central R.R. Co. *v.* White, *supra,* as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries, with resulting loss of life or earning capacity of men employed in hazardous occupations, is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through State agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of State power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the

performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: 'Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises.' Stertz *v.* Industrial Insurance Commission, 158 Pac. Rep. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the Fourteenth Amendment."

In view of the recent Federal decisions herein referred to it is obvious that "constitutional rigorism" is at an end and that the Fourteenth Amendment to the Constitution of the United States does not stand in the way of State legislation respecting health, unemployment and old age insurance. Of course the question still remains as to whether such measures are in violation of the provisions of the Constitution of Massachusetts.

That doubt could be removed by the adoption of an amendment expressly conferring upon the Legislature authority to provide for the several forms of social insurance herein considered.[1]

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[1] Since the above statement was prepared, the following constitutional amendment has been adopted in Massachusetts:

Amendment XLVII. The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

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BULLETIN No. 19

EXCESS CONDEMNATION

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EXCESS CONDEMNATION.

I. INTRODUCTION.

Excess condemnation is the taking by a public authority under the power of eminent domain of more land and property than are needed for the actual construction of a contemplated improvement with a view to selling the excess at such increase in value as may accrue from the improvement. A serious obstacle to the realization of plans for improvement is the universal constitutional limitation on the power of eminent domain through the provision that land cannot be taken except for a public purpose. The usual construction of this phrase allows a public authority to take only the land or the rights in land required for the actual use of the public.

The privilege to take more land than is necessary for public improvement is commonly urged on the following grounds: —

1. That it enables the public authority to control the future development of land adjacent to the improvement.

2. That it permits the replotting of remnants into suitable building lots.

3. That it will in some cases enable a city to recoup itself for expenditures involved in public improvements to a greater extent than would be possible through the levy of betterments.

II. CONSTITUTIONAL PROVISIONS RELATING TO EXCESS CONDEMNATION.

1. Provisions now in Force.

Excess condemnation has been provided for in the constitutions of five States, namely, Massachusetts, New York, Ohio, Wisconsin and Rhode Island. The gist of these constitutional provisions is given herewith and also the exact text of the amendments.

Massachusetts.

The Massachusetts amendment adopted in 1911 gives the State or one of its political subdivisions the power of excess condemnation. The power is limited by requiring —

1. That it apply only to streets.

2. That only enough land be taken to form suitable building lots abutting on the improvements.

3. That a city obtain a special act of the Legislature empowering it to condemn excess lands.

The text of the amendment to the Massachusetts Constitution is as follows:[1] —

> . . . The Legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the Commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: *provided, however,* that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street; and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

New York.

The New York amendment adopted in 1913 grants the power subject to these restrictions: —

1. That it apply only to parks and streets.

2. That only enough land be taken to make suitable building lots abutting on the improvement.

In 1911 a constitutional amendment granting a much broader power in the exercise of excess condemnation was defeated. This proposed amendment was as follows: —

> When private property shall be taken for public use by a municipal corporation, additional adjoining and neighboring property may be taken under conditions to be prescribed by the Legislature by general laws; property thus taken shall be deemed to be taken for public use.[2]

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[1] *Constitution of Massachusetts*, Amendments, Art. XXXIX.

[2] *Laws of New York, 1910*, Vol. 2, p. 2049. Proposed amendment to the New York Constitution to be known as Sect. 7 of Art. I.

The text of the present New York Constitutional provision is as follows: [1] —

> . . . The Legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased.

The New York constitutional amendment, like that of Massachusetts, provides that authorization must be obtained from the Legislature before the right of excess condemnation may be exercised. In 1914, the year following the adoption of the constitutional provision, an act was passed by the New York Legislature amending the Greater New York Charter so as to permit excess condemnation.[2] This act, however, was not accepted by the mayor. A similar act passed in 1915 was repealed by the Legislature by a conflicting statute enacted during the same session.[3] Finally in 1916 an act was passed in the proper manner by the Legislature and approved by the mayor of the City of New York, which gives the Board of Estimate and Apportionment of that city the power "to acquire additional real property in connection with any improvement," subject, of course, to the constitutional limitation "that such additional real property shall be not more than sufficient to form suitable building sites abutting on the improvement." The statute specifies in great detail the procedure according to which such property is to be acquired, the method of assessing damages, appeals by property owners and so on.[4]

Rhode Island.

The Rhode Island amendment which was adopted in 1916 is similar to the New York amendment. The text of the amendment is as follows: [5] —

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[1] *Constitution of New York*, Art. I, Sect. 7.
[2] Swan, Herbert S., *Excess Condemnation*, 56.
[3] *Laws of New York, 1915*, Chap. 593.
[4] An Act to amend the Greater New York Charter, *Laws of New York, 1916*, Chap. 112.
[5] *Constitution of Rhode Island*, Art. XVII, Sect. 1.

The General Assembly may authorize the acquiring or taking in fee by the State, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways: *Provided, however,* that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkways. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same.

Wisconsin.

The Wisconsin amendment of 1912 grants a somewhat broader power of excess condemnation than the States of Massachusetts, New York or Rhode Island. The enumeration of public improvements for which private property may be taken is very inclusive and there are no restrictions upon the area that may be expropriated, nor is the exercise of the right of excess condemnation dependent upon authorization by the State Legislature. The amendment reads as follows:[1] —

The State or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works.

Although this amendment permits a wide use of the power of excess condemnation, an attempt was made in 1914 to extend the power even further by the adoption of the following: —

[1] *Constitution of Wisconsin*, Art. XI, Sect. 3*a*.

When private property shall be or has been taken for public use by a municipal corporation, additional adjoining or neighboring property may be taken under conditions to be prescribed by Legislature by general law. Property thus taken shall be deemed to be taken for public use.[1]

The proposed amendment was defeated, however, by a vote of approximately three to one.[2]

Ohio.

The Ohio amendment adopted in 1912 is also rather comprehensive and grants the power of excess condemnation subject to no express limitation as to the amount of or purpose for which land may be expropriated. The power is restricted, however, by the prohibition that the bonds issued to pay for the excess land shall not be included in the municipality's indebtedness, but shall constitute a lien against the property thus acquired. The exact text of the amendment is as follows:[3] —

A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be made appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

2. Proposed Constitutional Amendments.

Pennsylvania.

In addition to the above States which have already established the right of excess condemnation in their constitutions it should be noted that the Pennsylvania Legislature has proposed a constitutional amendment for this purpose which will be submitted to the voters during 1917. The proposed Pennsylvania amendment provides that —

[1] *Laws of Wisconsin, 1913.* Joint Resolution, 25, p. 1374. Proposed amendment to be known as Sect. 3*b* of Art. XI.

[2] The figures in the *American Year Book for 1914* are 58,306 for, 150,621 against.

[3] *Constitution of Ohio*, Art. XVIII, Sect. 10.

The State, or any municipality thereof, acquiring or appropriating property or rights over or in property for public use, may, in furtherance of its plans for the acquisition and public use of such property or rights, and subject to such restrictions as the Legislature may from time to time impose, appropriate an excess of property over that actually to be occupied or used for public use, and may thereafter sell or lease such excess, and impose on the property so sold or leased any restrictions appropriate to preserve or enhance the benefit to the public of the property actually occupied or used.[1]

California.

In 1914 the people of California defeated a constitutional amendment providing for excess condemnation. The proposed amendment read as follows: —

The State or any county, city and county or incorporated city or town, taking or appropriating property within the limits thereof for public use for any proposed public improvement may also take and appropriate under the power of eminent domain, additional, adjoining or neighboring property within the limits thereof, in excess of that actually to be devoted to or occupied by the proposed improvement, and such additional land so taken shall be deemed to be taken for public use. The estate in such additional property so taken shall be a fee simple estate, and such additional property may be sold, leased or otherwise disposed of in whole or in part, under such terms and restrictions as may be appropriate to preserve or further the improvement made or proposed to be made. For the purpose of acquiring, constructing, enlarging or improving a public park, playground, boulevard, street, building or ground therefor, any county, city and county, incorporated city or town may condemn lands outside of its boundaries and within the distance of 10 miles therefrom, provided that no land within any other county, city and county, incorporated city or town shall be taken without the consent to be given in any manner that may be provided by law. The conditions under which such additional property may be taken or appropriated, the means and method of providing payment therefor and the terms and restrictions under which such property may be sold, leased, or otherwise disposed of shall be prescribed by general law.[2]

In 1915 an identical amendment was again adopted by the Legislature and submitted to the people, but was defeated, the popular vote being 92,048 in favor of the proposal and 155,786 against.[3]

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[1] *Laws of Pennsylvania, 1915*, 1106, Joint Resolution No. 1: Proposed amendment to Art. IX, to be known as Sect. 16.

[2] *Laws of California, 1913*, pp. 1704–05. Proposed amendment to the California Constitution, Art. XI, Sect. 20.

[3] *Laws of California, 1915*, p. 1864. Proposed amendment to the California Constitution, Art. XI, Sect. 20.

New Jersey.

An amendment authorizing excess condemnation was also submitted to a referendum vote in New Jersey during 1914, but, like the California provision, was defeated at the polls. This measure was almost identical in its provisions with the recent Rhode Island amendment and was as follows: —

> The legislature may authorize the State, or counties, cities, towns, boroughs or other municipalities, or any board, governing body or commission of the same to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating the parks, public places, highways or streets; provided, however, that the additional lands and properties so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land or property taken has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased and reasonable restrictions imposed.[1]

3. Summary of Constitutional Provisions.

From the above analysis of constitutional provisions dealing with the subject it appears that there is considerable variation as to the nature of the public improvements to which excess condemnation may be applied, the amount of land that may be taken, and as to the requirements for executory legislation. In Massachusetts the application of the right of excess condemnation is limited to streets; in New York and Rhode Island to streets and parks; while in Wisconsin the list of improvements enumerated by the Constitution is more inclusive. Ohio is the only one of the five States which does not restrict the exercise of excess condemnation to a specified list of purposes.

As to the amount of land that may be acquired, three of the five States, Massachusetts, New York, Rhode Island, provide that the excess property shall not be more than is necessary to form suitable building lots abutting on the improvement, while the Ohio and Wisconsin amendments do not contain such restrictions.

The right of excess condemnation is further limited in

[1] Proposed amendment to the New Jersey Constitution, Art. IV, Sect. IX. See *Laws of Special Session, 1915*, chap. 2, p. 894.

Massachusetts, New York and Rhode Island by the fact that the constitutional amendment does not of itself give cities this right, but requires that authorization for its exercise must be obtained from the State Legislature. In the Constitutions of Ohio and Wisconsin the grant of power is made directly to municipalities and it is not necessary to obtain authorization by statute.

III. PROVISIONS OF STATE LAWS RELATING TO EXCESS CONDEMNATION.

The right of excess condemnation has also been provided for in several States by legislation alone and without amending the constitution. Such legislation may be divided into two classes: first, special acts granting the power to a particular city and secondly general laws conferring the right upon any city in the State.

1. Special Acts.

The earliest instance of the exercise of excess condemnation in the United States was in 1812 when the New York Legislature passed an act giving the Commissioners of Estimate and Assessment of New York City the power to take and sell remnants of such lots as might be left after the opening of a street or park.[1] A similar law was enacted in 1833 applying to Brooklyn,[2] but in 1850 a decision was rendered holding that it was unconstitutional to take and dispose of surplus lands for profit except with the owner's consent.[3] Another early authorization of the right of excess condemnation was in New Jersey in 1870, when the Legislature gave the city of Newark the power to purchase at its discretion "all or any part of the lands, real estate, and buildings and improvements" within a prescribed area in order to enlarge, widen and straighten streets, and to sell such of the land as was not needed for public purposes.[4] More recently the State Legislature of Connecticut has passed a special act giving to the city of

[1] *Laws of New York, 1812*, Chap. 174.
[2] *Laws of New York, 1833*, Chap. 319, Sect. 3.
[3] Embury *v.* Connor (1850), 3 N. Y. 511.
[4] *Laws of New Jersey, 1870*, Chap. 117.

Hartford rather wide latitude in the taking of excess lands, although it is reported that the city has been most conservative in exercising its authority.[1]

2. General Laws.

Of greater importance than the above-mentioned special acts are the general laws which have been enacted in Virginia (1906) and Oregon (1913) permitting the exercise of the right of excess condemnation by any city. The Pennsylvania legislature passed a general law for the same purpose in 1907, but it was declared unconstitutional by the supreme court of the state on the ground that the constitutional provision permitting the appropriation of private property for public use contemplated an "actual use" by the public and not by private individuals.[2] The texts of the Virginia and Oregon excess condemnation acts are as follows: —

Virginia.

Any city or town of this Commonwealth may acquire by purchase, gift, or condemnation property adjoining its parks, or plats on which its monuments are located, or other property used for public purposes or in the vicinity of such parks, plats or property, which is used and maintained in such a manner as to impair the beauty, usefulness or efficiency of such parks, plats, or public property, and may likewise acquire property adjacent to any street, the topography of which, from its proximity thereto, impairs the convenient use of such street, or renders impracticable without extraordinary expense, the improvement of the same, and the city or town so acquiring any such property may subsequently dispose of the property so acquired, making limitations as to the uses thereof, which will protect the beauty, usefulness, efficiency or convenience of such parks, plats or property.[3]

Oregon.

Section 2. It shall be lawful for, and the right is hereby conferred upon any incorporated city of this State having 10,000 or more inhabitants to purchase, acquire, take, use, enter upon and appropriate land and property in excess of what may be needed for any such public squares,

[1] *Laws of Connecticut, 1907*, No. 61. See also *Report on Excess Condemnation* by Herbert S. Swan, issued by the Committee on Taxation of the City of New York, 1915, p. 59.

[2] *Laws of Pennsylvania, 1907*, No. 315. See also Pennsylvania Mutual Life Insurance Co. *v.* Philadelphia, 88 Atlantic Rep. 904.

[3] *Acts of Virginia, 1906*, Chap. 194, Sect. 1.

parks, or playgrounds; provided, however, that in the ordinance providing therefor the municipal authorities thereof shall specify and describe the land authorized to be taken, purchased, acquired, used and appropriated, which land shall not embrace more than 200 feet beyond the boundary line of the property to be used for such public squares, parks, or playgrounds, in order to protect the same by the re-sale of such neighboring property with restrictions whenever the councils thereof shall by ordinance determine thereon; provided, further, that in the said ordinance the councils thereof shall declare that the control of such neighboring property within 200 feet of the boundary lines of such public squares, parks, or playgrounds, is reasonably necessary, in order to protect such public squares, parks or playgrounds, their environs, the preservation of the view, appearance, light, air, health or usefulness thereof.

SECTION 3. That after so much of said land and property referred to in Section 2 of this act has been appropriated, as is needed, for public squares, parks or playgrounds aforesaid, the municipal authorities of such city may by ordinance authorize the sale of the remainder of such land or property and impose such restrictions in any deed or deeds of re-sale as may be deemed necessary or proper; provided, however, that such ordinance shall specify correctly and describe the land or property to be sold, and the restrictions in regard to the use thereof whenever the councils thereof shall by ordinance determine thereon and which are to be imposed and inserted in such deed or deeds of re-sale.

SECTION 4. That the taking, using, acquiring and appropriating of private property for any of the purposes herein specified, is hereby declared to be taking, using and appropriating such private property for public use; provided, however, that the proceeds arising from the re-sale of any neighboring property taken in excess of what may be necessary for the actual construction, opening, widening, extending and laying out of any such public square, park or playground, as in this act provided, shall be deposited in the treasury of said city and be used in the payment of the interest and as a sinking fund to retire any bond issues herein authorized. Any surplus arising from such transaction shall be turned over to and for the use of the park department of such city.[1]

IV. MASSACHUSETTS EXPERIENCE.

Excess condemnation has received more attention in Massachusetts than in any other State with the exception, perhaps, of New York. In 1903 the General Court appointed a legislative Committee on Eminent Domain which made an exhaustive study of land takings abroad and recommended a bill providing that remnants of lots unsuitable for building purposes

[1] *Laws of Oregon, 1913*, Chap. 269. This act does not apply to Portland, as the Legislature cannot amend the charter of that city. Branch *v.* Albee, 142 Pac. Rep. 598.

might be acquired in connection with the acquisition of land for public improvements.[1]

A measure based in part upon the recommendations of this committee was enacted by the Legislature in 1904. The essential provision of this statute (omitting various sections relating to the award of damages, etc.) is as follows: —

. . . . . .

> The Commonwealth, or any city in the Commonwealth so far as the territory within its limits is concerned, may in the manner hereinafter set forth, take in fee by right of eminent domain the whole of any estate, part of which is actually required for the laying out, alteration or location by it of any public work, if the remnant left after taking such part would from its size or shape be unsuited for the erection of suitable and appropriate buildings, and if public convenience and necessity require such taking.[2]

On account of its doubtful constitutionality there was considerable hesitancy in making use of the statute of 1904. The matter was further complicated by an advisory Opinion of the Justices of the Supreme Court in 1910 which expressed the view that the acquiring and re-allotting of land on either side of a thoroughfare in parcels of suitable size and shape for sale to private individuals bore no direct relation to the construction or use of the street and would be unconstitutional.[3] The result was that in 1911 a constitutional amendment permitting the General Court to authorize excess condemnation of land for public purposes was submitted to the voters and adopted, thus removing all question of constitutionality.[4]

Excess Condemnation at Worcester. — As noted above the exercise of the right of excess condemnation in Massachusetts necessitates the special permission of the Legislature. So far there has been only one instance of the application of this power in the State, namely in Worcester. In 1912 the General Court granted this city the right to take excess property in the widening of Belmont Street by an act which reads in part as follows: —

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[1] House Document, No. 288, Dec. 28, 1904.

[2] *Acts and Resolves of Massachusetts, 1904*, Chap. 443, Sect. 2.

[3] *Opinion of the Justices* (1910), 204 Mass. 607, 616.

[4] The text of this amendment may be found *ante*, p. 112.

Section 1. The city of Worcester is hereby authorized to take in fee for the purpose of widening Belmont street, so-called, in that city, the whole or parts of a strip of land, not exceeding one hundred and sixty feet in depth, from the southerly side of Belmont street between the point of intersection of the easterly line of Warden street with the southerly line of Belmont street easterly to the point of intersection of the westerly line of Lake avenue with the southerly line of Belmont street.

Section 2. After so much of the land or property as is taken by the city for the purpose of widening Belmont street on the southerly side thereof, in accordance with the provisions of section one, has been appropriated for such street as is needed therefor, the city may sell the remainder for value, with or without suitable restrictions.[1]

The object in obtaining the power of excess condemnation was to enable the city to control the remnants of land which would be left if only such property was taken as was necessary for the actual widening of the street. In accordance with the provisions of the act the city condemned and took 198,010 square feet, about half of which was used for the actual widening of the street, the remainder being divided into buildings lots abutting on the boulevard. About $46,000 has already been paid for the land, the money having been borrowed on ten-year bonds at three and one-half per cent. The financial results of this experiment are not yet available as the city has not paid for all the land acquired nor sold the excess.

[1] *Acts and Resolves of Massachusetts, 1912*, Chap. 186.

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BULLETIN No. 20

CLASSIFICATION OF PROPERTY FOR PURPOSES OF TAXATION

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CLASSIFICATION OF PROPERTY FOR PURPOSES OF TAXATION.

I. Equality in Taxation.

The constitutions of most of the States of the Union were formed under the influence of a very literal interpretation of the principle of equality before the law. This was especially true with respect to taxation, and hence it is common to find a constitutional requirement that taxes shall be equal or uniform. In those States in which the courts have held this to require all forms of property to be taxed at the same rate, this limitation upon the taxing power runs counter to the opinion now commonly held by students of finance that it may be both politically and economically advantageous to tax different kinds of property or even different amounts of the same kind of property at different rates. To tax one kind of property at a lower rate than another does not necessarily mean the giving of an unjustifiable concession or the granting of a special favor. It is often the only means of equalizing the public burden which different kinds of property may be called upon to bear. In Massachusetts the principle of a varying rate in taxation has been recognized in the Forty-first Amendment to the Constitution by which the Legislature is authorized "to prescribe for wild or forest lands such methods of taxation as will develop and conserve the forest resources of the commonwealth," and in the Forty-fourth Amendment in which authority is given to levy an income tax which "may be at different rates upon income derived from different classes of property." With these exceptions, however, the Constitution requires that all taxes levied shall be "proportional." But the Supreme Judicial Court has carefully distinguished taxes from excises, and while it has rigorously interpreted the word "proportional" as applied to taxes, it has opened a way to relief by removing excises from the operation of the rule of uniformity. In Oliver *v.* Washington Mills (1865), 11 Allen, 268, 274, the Court said:

The words "tax" and "excise," although often used as synonymous, are to be considered as having entirely distinct and separate significations, under the provisions of the Constitution of Massachusetts, c. 1, sec. 1, art. 4. The former is a charge apportioned either among the whole people of the State, or those residing within certain districts, municipalities or sections. It is required to be imposed, as we shall more fully explain hereafter, so that, if levied for the public charges of government, it shall be shared according to the estate, real and personal, which each person may possess; or, if raised to defray the cost of some local improvement of a public nature, it shall be borne by those who will receive some special and peculiar benefit or advantage which an expenditure of money for a public object may cause to those on whom the tax is assessed. An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid. Portland Bank *v.* Apthorp, 12 Mass. 252, 255. Commonwealth *v.* People's Savings Bank, 5 Allen, 431.

Of the remaining States of the Union thirty-four permit property to be classified for purposes of taxation. Nineteen of these States accomplish this by express constitutional provision, and as an indication of the present trend of opinion it is significant that thirteen of the nineteen have adopted this provision within the past twenty years. (See *post*, page 14.)

II. What is a "Proportional" Tax.

The term "proportional" has been interpreted in many decisions of the Supreme Judicial Court. Some of the more important are here indicated. In Portland Bank *v.* Apthorp (1815), 12 Mass. 252, 255, the Court said:

Those taxes must be proportional upon all the inhabitants of, persons resident, and estates lying, within the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution.

In Oliver *v.* Washington Mills (1865), 11 Allen, 268, 275, Chief Justice Bigelow said that taxes "should be laid on property, real and personal, within the Commonwealth, so that, taking 'all the estates lying within the Commonwealth' as one of the elements of proportion, each taxpayer should be obliged to bear only such part of the general burden as the property owned by him bore to the whole sum to be raised." The learned judge then continued:

> This rule of proportion was based on the obvious and just principle that the benefit which such person derives from the government has direct relation to the amount of property which he possesses and enjoys under its sanction and protection. It was to prevent this essential principle from being violated or disregarded, and to render it certain that taxation for general purposes of government should be made equal, that it was expressly provided in the Constitution that a valuation of estates within the Commonwealth should be taken anew decennially at least, and oftener if the Legislature should order. Having regard to these explicit provisions of the Constitution, we think it clear beyond dispute that an unlimited discretion on the subject of taxation, especially as to money raised for the public charges of government, was not reposed in the Legislature.

In Cheshire *v.* County Commissioners (1875), 118 Mass. 386, 389, the Court said:

> That provision requires that all taxes levied under its authority be "proportional and reasonable," and forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation. . . . No enactment respecting taxation under this clause conforms to its provisions if it directly and necessarily tends to disproportion in the assessment.

In Northampton *v.* County Commissioners (1887), 145 Mass. 108, 109, the Court expressed similar views in these words:

> If, for instance, the Legislature should arbitrarily designate a certain class of persons on whom, or a certain class of property on which, a tax was to be imposed, without reference to any rule of proportion, or without regard to the share of the public charge which either should bear relatively to that borne by other persons or property, or without regard to any special benefit which might accrue to the property subjected to the tax, such imposition would be unlawful.

In 1908, the Senate asked the opinion of the Justices of the Supreme Judicial Court as to the validity of an act "exempting from all other taxation, State and local, the classes of intangible personal property hereinafter enumerated, and to impose thereon, either as a property tax, duty, or excise, a uniform tax at the rate of three mills in each dollar of the fair cash valuation thereof, viz.:

"(1) Money on hand, on deposit, or at interest, and other debts due the taxpayer;

"(2) Public stocks and securities;

"(3) The bonds of domestic and foreign corporations;

"(4) The shares in the capital stock of foreign corporations now taxable under the provisions of Chapter 12 of the Revised Laws."

In reply to this inquiry the Justices made an extensive examination of the interpretation of the word "proportional," and said (195 Mass. 607, 614):

> The natural and direct effect of the exemption referred to in the question propounded by the honorable Senate would be to diminish very largely the amount of property taxable at the regular rate, and to impose upon the exempted property a tax at hardly more than one fifth of the average rate in the cities and towns of the Commonwealth. This would tend largely to increase the rate upon other classes of property, and thus to make the tax disproportional. We are of opinion that such a method of taxation would be unconstitutional.
>
> The only plausible argument to be urged to the contrary is that, because of the difficulty of enforcing the law in the taxation of intangible property, much of it goes untaxed, and the proposed exemption of it in part would be likely to produce greater returns from it than are obtained under the present system. We do not think that this conjecture, founded on the failure to enforce the present law, and the possibility that a statute less onerous upon the owners of this class of property would be better enforced, justifies a method of taxation which is necessarily, and by intendment, very disproportional. To warrant a plain departure from the general rule prescribed by the Constitution, it would be necessary to show, not only that this rule fails to accomplish the object of its authors, but that the proposed rule, confessedly far from correct, would be almost certain to give better results. Predictions, resting on the nonenforcement of one law and the uncertainty whether another similar but less burdensome law would be enforced, are too unreliable to warrant a disregard of a simple rule of proportion embodied in the Constitution. But if these were established facts they would not justify a departure from the plain meaning of the Constitution requiring taxes to be proportional.

In the Opinion of the Justices (1911), 208 Mass. 616, these earlier authorities were reviewed and affirmed. The subject again received elaborate consideration in the Opinion of the Justices (1915), 220 Mass. 613, 618, where the Court repeated the substance of the foregoing opinions in the following cogent language:

> The answers to all these questions depend upon the interpretation of Chapter 1, Section 1, Article 4 of the Constitution of Massachusetts, whereby the General Court is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same." These words contain the entire grant to tax. They comprehend two general powers, one to lay assessments, rates and taxes upon persons and property, the other to impose duties or excises upon commodities. These two branches of the taxing power are clearly separated. They are different in kind and are expressed in different terms. The power to tax, which includes the power to levy assessments, rates and taxes, relates to persons and property. The power in this respect is not boundless. It is restricted to the extent that it must be "proportional and reasonable." These are words of limitation. Capitation and property taxes must be levied in conformity to this limitation. The significant word in the present connection is "proportional." A general property tax, in order to be proportional, must be divided so that the amount to be raised shall be shared by the taxpayers according to the taxable real and personal estate of each. A tax for a local improvement must be apportioned according to the benefit accruing to the several estates from the public expenditure. While the power to tax includes all persons and all estates within the Commonwealth, and this is most comprehensive, at the same time the restriction to the effect that all taxes must be "proportional" is equally extensive. On the other hand an excise, including thereby both duties and excises, is of a different character. It need not be based on any rule of proportion. It must only be "reasonable." It is a fixed and absolute charge upon the element selected, without reference to the amount of property or the benefit of the taxpayer.

III. Recommendations of Massachusetts Tax Officials.

The Special Commission on Taxation appointed in 1915, in discussing the principle of uniformity as expressed by the word "proportional," made these observations:

The chief argument for the principle is only an argument for it as a principle general in its application, and not for it as a principle applying to the taxation of a limited portion of the taxable property of the Commonwealth. That argument is stated by the Supreme Judicial Court in Volume 195, Massachusetts Reports, at page 612, as follows [quoted from 11 Allen, 268, 275]: —

> This rule of proportion was based on the obvious and just principle that the benefit which each person derives from government has direct relation to the amount of property which he possesses and enjoys under its sanction and protection.

It is clear, of course, that the words "amount of property" in the sentence quoted mean "whole amount of property," and it is further mathematically clear that if a just and proportional tax is secured by taxing all within the taxing district at the same rate upon all their property, so that the tax of each is in direct proportion to the whole amount of his property, that tax cannot be just or proportional which taxes some within the taxing district who are owners of real estate at one rate and others who are owners of intangible property at another rate. Taxes under such a system may be not at all in proportion to the total amount of property held by individual taxpayers. We are driven either to accept the principle as applied to all property or to abandon it altogether. By adopting the recent constitutional amendments [Forty-first and Forty-fourth], the people of this Commonwealth have approved the doctrine that a tax need not be proportional to be just. The Commission therefore believes that the requirement should be removed from the Constitution.

The Commission also questioned the soundness of the principle laid down by the court in Oliver *v.* Washington Mills (1865), 11 Allen, 268, that the rule of proportion distributes the burden of taxation according to the benefits received. The Commission said:

> While it would be difficult for the Legislature, even if unimpeded by constitutional provisions, to distribute with certainty and with equity the burdens of government on the theory of benefit, because it is practically impossible in most cases to measure the benefit which each individual receives, we believe that the task is impossible for a Legislature limited by the provision that taxes must be proportional.
>
> The pauper who at public expense is given the best of medical or surgical treatment at a modern hospital may owe life itself to organized government, while the strong and intelligent man who has attained wealth under our system of government might, through his strength and intelligence, have secured at least his own material comfort in a state of anarchy. It is incorrect to say that the amount of property which each enjoys is a

measure of the benefit he receives from government, and that therefore he should pay taxes in proportion to his property.

Most political economists and writers on the principles of taxation, while recognizing the fact that the benefits each enjoys from government are greater than any taxes he may ever be called on to pay, realize the impossibility of equitably apportioning those benefits, and for this reason and others abandon the principle that taxes should be laid in proportion to benefits received. They adopt instead the more easily applied principle that the burdens of government should be distributed in proportion to the ability of the taxpayer to bear them.

Our present constitutional limitation does roughly comply with this requirement, for the amount of property a man possesses is certainly some measure of his ability to pay taxes. But in actual application it is no doubt a much less accurate measure than it was at the time the Constitution was adopted, since the increase of intangible property and even of many kinds of tangible property has added to the difficulties of discovery and assessment.

The Commission further called attention to the fact that the rule of uniformity as established in the Constitution prevented the adoption of other principles of taxation which are generally accepted as sound and desirable. As to this aspect of the subject, the Commission said: —

Further, the constitutional provision takes no account of the principle of progression, which in theory commends itself to most writers on taxation. A laboring man with an income of $600, a family of four children and property to the amount of $2,000 is much less able to pay an annual tax of $40 than is the man — possibly a bachelor — with $300,000 of productive property to pay a tax of $6,000. The tax in the second case, large as it is, does not demand a sacrifice from the taxpayer of actual necessaries of life. In our inheritance and succession tax, which has been held to be an excise and so not subject to the constitutional limitation under discussion, the Commonwealth has observed the principle of progression rather than of proportion. The Commission believes that most people familiar with the inheritance tax consider it more just in principle than is the property tax.

It should further be observed that the constitutional limitation under consideration takes no account of the diffusion of tax burdens. It is generally recognized that the actual burden of a tax often does not remain where the law first placed it. If a tax is levied on ground rent, it seems to be generally admitted that landlords alone pay it, but a tax on houses will to some extent fall on the tenants. A tax on machinery may have either the effect of adding to the price of the product, or, if that is impossible because of competition from outside the State where burdens are less oppressive, of driving certain manufacturers from the Commonwealth.

Because of such considerations the Commission believes that certain kinds of property cannot justly be taxed on income, and yet ought not to be taxed at the same rates as land values. Among such kinds of property are included live-stock and agricultural products, certain farm implements and machinery, and probably machinery employed in production and merchandise awaiting sale. But the Commission is not now recommending that the Commonwealth should at once adopt a system of taxation involving the principle of progression or relieve to any degree manufacturing or agricultural machinery from taxation. Its position is rather that it should be possible to take such action as may at the time commend itself to a majority of the Legislature, and to retain such changes so long as experience proves them wise. As tax laws produce very different effects when applied to different classes of property, it should be possible to give due consideration to those effects when framing laws.

The Legislatures of many States, including the neighboring States of New York, Pennsylvania, Rhode Island and Connecticut, possess this power to tax different classes of property at different rates, and it is often exercised for the purpose of developing the resources of their respective States, sometimes to the distinct loss of our own Commonwealth. The Commission believes that this right could wisely be granted to the Legislature of this State.

To sum up, the requirement of proportionality is wrong in theory and contrary to the best practice, and should be removed from the Constitution.

The Tax Commissioner of Massachusetts has several times made recommendations in substantial accord with those of the Special Commission on Taxation. In 1914 he said:

Our tax system exhibits mistakes in principle and weaknesses of administration. The former are fundamentally responsible for the very unsatisfactory condition in which we find ourselves. And yet apparently we must adhere to them so long as our Constitution continues to restrict the Legislature. Some of the States of the country have never had such constitutional limitations as exist here. In Rhode Island, Connecticut and New York the Legislature is substantially free to do as it will in the taxation of different classes of property in different ways. And it is worthy of note that wisdom rather than folly has characterized their tax enactments. Pennsylvania, Maryland, Wisconsin, Minnesota, Iowa, North Dakota, Washington and California are other States in which in recent years changes in constitutions or laws or both have been made, in consequence of which the Legislature has freer action and greater discretion. In these States improvement has been made by one method or another, and their condition in respect to the underlying principles of fiscal policy and tax law is better than ours.

The improvements accomplished in these several States are either in

the direction of the classification of property for purposes of taxation, or the taxation of some kinds of property in terms of the income it produces. A third way does not exist. Either method is preferable to the system made necessary by our Constitution.[1]

In 1915, in a special report to the Legislative Committee on Taxation, the Tax Commissioner said:

"Proportional" taxation has been defined by the Supreme Judicial Court in various decisions. Roughly speaking, we may say that under the rule of proportionality it has been deemed necessary that every kind of property here taxed must be taxed at the same rate as every other kind of property which is taxed, or that all taxable property must be subject to the same rate of taxation. Each municipality is a taxing district, and it follows that there are as many tax rates as there are municipalities, since in every case the rate is merely a *quotient, i.e.*, the total amount to be raised divided by the total valuation of the assessed property in the municipality. Thus, the property of Woburn, with a rate of $26, is not taxed "proportionately" with the property of Orleans, where the rate is $3; but all taxed property in Woburn is taxed at $26, and all taxed property in Orleans is taxed at $3, — and so on in every municipality. The Supreme Judicial Court has said that it is not possible for the Legislature to establish a uniform tax rate for any class of property everywhere in the Commonwealth, leaving other classes of property taxable at various municipal rates. This would not be "proportional." [2]

The Tax Commissioner further indicated that in his judgment the tax laws then in force had resulted in "the most disproportionate and unreasonable taxation between residents of various towns, and also as between residents of the same town owning different classes of property," and he added that a more strict enforcement "would cause equal or greater disproportion and unreasonableness." Since the above was written, the Forty-fourth Article of Amendment has been adopted, authorizing the classification of property for the purpose of levying an income tax. How far this obviates the objections to the requirement of uniformity in other forms of taxation it is difficult to determine.

In 1915 the Legislature passed a resolution providing for the submission to the people of an amendment removing the word "proportional" from the Constitution. The vote was 202 to 6

[1] *Report of the Tax Commissioner for the Year 1914*, 8.

[2] *The Intent and Operation of the Tax Laws of Massachusetts.* Senate Doc. (1915), No. 440, p. 5.

in the House and 35 to 2 in the Senate. In 1916 the resolution again passed the House by a vote 179 to 49, but was defeated in the Senate by a vote of 15 to 22.

IV. The Practice of the Several States.

An examination of the constitutional provisions concerning the authority of the Legislature to classify property for purposes of taxation shows that thirty-four out of the forty-eight States of the Union permit such classification. In nineteen of these States there is express provision to that effect. In ten States the courts have held that the constitutional requirement of uniformity only means uniformity as to all property of the same kind or class. The constitutions of five States contain no restrictions on the taxing power other than certain vague phrases of doubtful meaning, and the courts of these States have held that classification is constitutional. In the remaining fourteen States, there is a constitutional requirement of uniformity, although in some, *e.g.*, Massachusetts, classification is permitted to a limited extent.

The States may be arranged with reference to their constitutional provisions as to classification in the following groups:

1. States in which classification is explicitly provided for, with the date of the adoption of the constitutional provision: Arizona (1911); Colorado (1876); Delaware (1897); Georgia (1877); Idaho (1889); Illinois (1916); Kentucky (1915); Louisiana (1916); Maine (1913); Maryland (1915); Michigan (1908); Minnesota (1906); Missouri (1875); Montana (1889); New Mexico (1914); North Dakota (1914); Oklahoma (1907); Pennsylvania (1874) and Virginia (1902).

2. States in which the constitutional requirement of uniformity has been interpreted by the courts to mean uniformity as to property of the same kind or class: Alabama, Florida, Indiana, Kansas, Mississippi, New Jersey, North Carolina, Oregon, South Dakota and Wyoming.

3. States having only vague restrictions on the taxing power and in which the courts have held that classification is constitutional: Connecticut, Iowa, New York, Rhode Island and Vermont.

4. States in which the constitutional requirement of uniformity is held to debar classification: Arkansas, California, Massachusetts (with exceptions), Nebraska, Nevada, New Hampshire, Ohio, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin and West Virginia.

Amendments authorizing the classification of property for purposes of taxation were rejected by the people in Kansas, Nebraska, North Carolina, Ohio and Oregon in 1914, in California and Utah in 1915 and in South Dakota in 1916. An amendment expressly re-enacting the requirement as to uniformity with certain specific exceptions was adopted by the Legislature of Arkansas in 1915, but has not yet been acted upon by the people.

Appendix.

Constitutional Provisions as to Classification of Property.

Alabama, Art. XI, Sec. 211. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property, . . .

"The rule of uniformity does not require that all subjects be taxed, nor taxed alike. The requirement is complied with when the tax is levied equally and uniformly on all subjects of the same class and kind."

Hooper *v.* State (1904), 141 Ala. 111.

Arizona, Art. IX, Sec. 1. . . . All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only.

Arkansas, Art. XVI, Sec. 5. All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than another species of property of equal value.

"The Legislature cannot discriminate between different classes of property in the imposition of taxes. Its only discretion is in the ascertainment of values so as to make them equal and uniform throughout the State."

L. R. & F. S. Ry. *v.* Worthen (1885), 46 Ark. 312, 327.

California, Art. I, Sec. 11. All laws of a general nature shall have a uniform operation.

Art. XIII, Sec. 1. All property . . . shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided.

"But if it is still contended that taxation is equal when the same species of property, whatever it may be, is charged with the same ad valorem tax, the next clause of the section, 'All property in this State shall be taxed in proportion to its value.' is a complete answer to the position."

People *v.* McCreery (1868), 34 Cal. 432, 455.

Colorado, Art. X, Sec. 3. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, . . .

Carbon County Sheep & Cattle Co. *v.* Routt County (1915), 60 Col. 224, 228.

CONNECTICUT. There are no constitutional provisions in Connecticut bearing expressly on taxation or using that term. Hence there is no requirement of equality or uniformity in taxation in the Constitution of Connecticut, and no such requirement may be implied from the nature of the instrument or the spirit of the Constitution.

State *v.* Travelers Ins. Company (1898), 70 Conn. 590.
State *v.* Travelers Ins. Company (1900), 73 Conn. 255.

"The statute in question has selected a class of property formerly exempt from taxation and made it subject to assessment. The plaintiff's property comes within that class. The plaintiff cannot complain because their like property subject to different uses, still remains exempt."

Norwalk *v.* New Canaan (1911), 85 Conn. 119, 124.
Baker *v.* West Hartford (1915), 89 Conn. 394, 398.

DELAWARE, Art. VIII, Sec. 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, . . .

Art. VIII, Sec. 5. The General Assembly shall provide for levying and collecting a capitation tax . . . but such tax to be collected in any county shall be uniform throughout that county, . . .

FLORIDA, Art. IX, Sec. 1. The Legislature shall provide for a uniform and equal rate of taxation, . . .

Classification of property for the purpose of taxation is constitutional. An act imposing a certain tax on all lands comprised in a certain class is uniform and equal although it be shown that different lands in that class differ in value.

Levy *v.* Smith (1851), 4 Fla. 154.
Hayes *v.* Walker (1907), 54 Fla. 163.

GEORGIA, Art. I, Sec. 3, Par. 1. Laws of a general nature shall have uniform operation throughout the State, . . .

Art. VII, Sec. 2, Par. 1. All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, . . .

Ga. R.R. & Banking Co. *v.* Wright (1906), 125 Ga. 589.

IDAHO, Art. VII, Sec. 2. The Legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, . . .

Art. VII, Sec. 5. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, . . .

ILLINOIS, Art. IX, Sec. 1. The General Assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property . . . but the General Assembly shall have the power to tax peddlers, auctioneers . . . in such manner as it shall from

time to time direct by general law, uniform as to the class upon which it operates.

Equality and uniformity were the controlling principles in taxation.

Board of Supervisors *v.* Wider (1872), 64 Ill. 427.
The Home Ins. Co. *v.* Swigert (1882), 104 Ill. 653.

Art. IX, Sec. 14. From and after the dates when this section shall be in force the powers of the General Assembly on the subject matter of the taxation of personal property shall be as complete and unrestricted as they would be if sections one (1), three (3), nine (9) and ten (10) of this article of the Constitution did not exist; *Provided, however*, that any tax levied upon personal property must be uniform as to persons and property of the same class within the jurisdiction of the body imposing the same, . . .

This section was added by an amendment adopted November 7, 1916.

Indiana, Art. X, Sec. 1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; . . .

"What property shall be assessed and how it shall be taxed are legislative questions, so long as there is uniformity and equality of rate as to those of the same class."

Smith *v.* Stephens (1910), 173 Ind. 564, 567.
Board *v.* Johnson (1909), 173 Ind. 76.

Iowa, Art. 1, Sec. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

Equality of taxation does not mean that taxes may not be required of some which are not exacted of others; but that all persons subject to the same conditions must be uniformly taxed.

Pringhar State Bank *v.* Rerick (1895), 96 Iowa, 238.
Ins. Assn. *v.* Gilbertson (1906), 129 Iowa, 658, 665.

"It is . . . within the power of the Legislature to prescribe this special mode of valuation as applied to this class of property [railways]."

City of Dubuque *v.* C. D. & M. R.R. (1878), 47 Iowa, 196, 203.

The uniformity prescribed permits classification as to methods of taxation; and an act which provides a specific rule for the assessment of express and telegraph companies, different from that applicable to the assessment of other property, has been held sufficiently uniform.

U. S. Express Co. *v.* Ellyson (1869), 28 Iowa, 370, 374.
Central Iowa Ry. Co. *v.* Board of Supervisors (1885), 67 Iowa, 199.

Kansas, Art. II, Sec. 17. All laws of a general nature shall have a uniform operation throughout the State; . . .

Art. XI, Sec. 1. The Legislature shall provide for a uniform and equal rate of assessment and taxation; . . .

"The only limitations on the power to impose taxes of this kind [property taxes] are . . . classification shall be natural and not arbitrary or capricious, and that all persons or subjects in the same class shall be treated in the same way."

Wheeler *v.* Weightman (1915), 96 Kan. 50, 65.

KENTUCKY, Sec. 171. . . . Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; . . .

Sec. 174. All property whether owned by natural persons or corporations, shall be taxed in proportion to its value, . . .

The requirement of uniformity was held not to prevent a reasonable diversity as to methods of taxation of different classes of property.

Commonwealth *v.* Taylor Co. (1897), 101 Ky. 325, 337.
Morrell Refrigerator Car Co. *v.* Commonwealth (1908), 128 Ky. 447, 454.

Amendment. The General Assembly shall provide by law an annual tax, . . . Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation.

This amendment was adopted November 2, 1915.

LOUISIANA, Art. 225. Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and property shall be taxed in a manner directed by law; provided that the valuation of property for the assessment of State taxes, levied by the General Assembly and by this Constitution, may be different from the valuation fixed for all other purposes; provided, further, the assessment of all property shall never exceed the actual cash value thereof; and, provided, further, that the tax-payers shall have the right of testing the correctness of their assessments before the courts of justice.

This amendment was adopted November 7, 1916.

MAINE, Art. IX, Sec. 8. All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof; but the Legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property.

The second part of the above section was added by an amendment adopted in 1913. For an interpretation of the words "apportioned and assessed equally" see Answer of the Justices (1907), 102 Maine, 527, 528, in which it was said:

"This provision [of the Constitution] simply requires that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally."

MARYLAND, Declaration of Rights, Art. XV. . . . but every person in the State, or person holding property therein, ought to contribute his proportion of public taxes to the support of the Government, according to his actual worth in real or personal property; . . .

The provision in the Declaration of Rights is a positive limitation upon the legislative power of taxation, requiring all taxes to be equal and uniform.

Daly *v.* Morgan (1888), 69 Md. 460, 477, 483.

"The Legislature is required to cause all public taxation . . . to be fair and equal in proportion to the value of the property assessed, so that no class or species of property shall be unequally or unduly taxed."

State *v.* Cumberland & Penn. R.R. Co. (1873), 40 Md. 22, 50.

Declaration of Rights, Art. XV. . . . that the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and sub-classifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy; . . .

This amendment was adopted November 2, 1915.

MASSACHUSETTS, Part 2, Chap. 1, Sec. 1, Art. IV. And further, full power and authority are hereby given and granted to the said General Court . . . to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth.

Amendments, Art. XLI. Full power and authority are hereby given and granted to the General Court to prescribe for wild or forest lands such methods of taxation as will develop and conserve the forest resources of the Commonwealth.

Amendments, Art. XLIV. Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

MICHIGAN, Art. X, Sec. 3. The Legislature shall provide by law a uniform rule of taxation, . . .

Art. X, Sec. 4. The Legislature may by law impose specific taxes, which shall be uniform upon the classes upon which they operate.

A tax on the liquor traffic as a condition of doing business is uniform if imposed upon all persons alike, regardless of the amount of business done.

Youngblood *v.* Sexton (1875), 32 Mich. 406.

A tax on inheritances is a specific tax, even though based upon the value of the property inherited.

Union Trust Co. *v.* Wayne Probate Judge (1901), 125 Mich. 487.

Art. X, Sec. 5. The legislature may provide by law for the assessment at its true cash value by a State board of assessors, of which the Governor shall be *ex officio* a member, of the property of corporations and the property, by whomsoever owned, operated or conducted, engaged in the business of transporting passengers and freight, transporting property by express, operating any union station or depot, transmitting messages by telephone or telegraph, loaning cars, operating refrigerator cars, fast freight lines or other car lines and running or operating cars in any manner upon railroads, or engaged in any other public service business; and for the levy and collection of taxes thereon.

This section was adopted as an amendment in 1908.

MINNESOTA, Art. IX, Sec. 1. . . . Taxes shall be uniform upon the same class of subjects, . . .

MISSISSIPPI, Art. 112. Taxes shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value . . .

Property shall be assessed for taxes under general laws, and by uniform rules, according to its value.

"Each State has the sovereign right to classify property for purposes of assessment and taxation, and so long as property of the same class bears the same rate, or, to state differently, so long as there is no discrimination between property of the same class, there is no violation of these provisions of our Federal Constitution."

Magnolia Bent *v.* Pike Company (1916), 111 Miss. 857, 866.

MISSOURI, Art. X, Sec. 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, . . .

Art. X, Sec. 4. All property subject to taxation shall be taxed in proportion to its value.

MONTANA, Art. XII, Sec. 1. The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, . . .

Art. XII, Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the

same class of subjects within the territorial limits of the authority levying the tax.

NEBRASKA, Art. IX, Sec. 1. The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, . . . and it shall have power to tax peddlers, auctioneers, . . . in such manner as it shall direct by general law, uniform as to the class upon which it operates.

"By the first clause of the section, . . . a tax laid . . . is imperatively required to be levied by valuation, so that the tax shall be in proportion to the value of property and franchises. Under these provisions there can be no discrimination between persons or classes."

Aachen & Munich Fire Insur. Co. *v.* Omaha (1904), 72 Neb. 518, 521.

NEVADA, Art. IV, Sec. 21. . . . where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

Art. X, Sec. 1. The Legislature shall provide by law for a uniform and equal rate of assessment and taxation.

All ad valorem taxes must be equal.

State *v.* Kruttschnitt (1868), 4 Nev. 178.

NEW HAMPSHIRE, Part II, Art. 5. Full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and residents within the said State, and upon all estates within the same.

Part II, Art. 6. The public charges of government, or any part thereof may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; . . .

This was substituted for the original article 6 by an amendment adopted in 1903.

Before the amendment to the Constitution the words "proportional" and "reasonable" in this Constitution had been held to mean about the same thing that "uniform" and "equal" do in others. They secured uniformity of operation of tax laws and equality of rate and valuation.

Opinion of Justices (1827), 4 N. H. 564.

A property tax assessed on one certain class selected by the Legislature is void under the Constitution.

State *v.* Express Co. (1880), 60 N. H. 219, 245.

The constitutional amendment did not change the law.

"Taxes must be laid with due regard to proportion, *i.e.*, at the same rate in proportion to the value of the property taxed as the tax upon other property."

Opinion of Justices (1915), 77 N. H. 611, 616.

New Jersey, Art. IV, Sec. 7, Par. 12. Property shall be assessed for taxes under the general laws and by uniform rules, according to its true value.

When selected and classified, all property in a class must be taxed by a uniform rule.

State Board Assess. *v.* Central R.R. Co. (1886), 48 N. J. L. 146.
Essex Co. Contract Com. *v.* West Orange (1909), 77 N. J. L. 575, 577.

New Mexico, Art. VIII, Sec. 1. Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class.

This provision was adopted in 1914.

New York. The Constitution of the State of New York contains no provisions specifically relating to the revenue assessment, but by amendment adopted in 1901 the Legislature is forbidden to pass any private or local law exempting any person, association, firm or corporation from taxation on real or personal property.

"The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, . . . provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs."

People *v.* Reardon (1906), 184 N. Y. 431, 445.

North Carolina, Art. V, Sec. 3. Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money. The General Assembly may also tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed.

Art. VII, Sec. 9. All taxes levied by any county, city, town, or township shall be uniform and ad valorem, upon all property in the same, except property exempted by the constitution.

"A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed."

Railroad *v.* New Bern (1908), 147 N. C. 165, 167.

North Dakota, Art. I, Sec. 11. All laws of a general nature shall have a uniform operation.

Art. XI, Sec. 176. Laws shall be passed taxing by uniform rule all property according to its true value in money, . . .

Amendment, Sec. 176. Taxes shall be uniform upon the same class of property, including franchises, within the territorial limits of the authority levying the tax, . . .

This amendment was adopted November 3, 1914.

Ohio, Art. II, Sec. 26. All laws of a general nature shall have a uniform operation throughout the State.

Art. XII, Sec. 2. Laws shall be passed taxing by uniform rule all moneys, credits, . . .; and also all real and personal property, according to its true value in money, . . .

See Banks *v.* Hines (1853), 3 Ohio State 1.

Oklahoma, Art. X, Sec. 5. . . . Taxes shall be uniform upon the same class of subjects.

Art. X, Sec. 22. Nothing in this Constitution shall be held or construed to prevent the classification of property for purposes of taxation, and the valuation of different classes by different means and methods.

Oregon, Art. I, Sec. 19. No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Art. IX, Sec. 1. The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation, . . .

Art. X, Sec. 5. . . . and all taxation shall be equal and uniform.

"The Legislature have power to divide the property selected for taxation into classes, and to prescribe different rates of taxation for each class; or they may prescribe different rules for the valuation of the different classes of property. . . . Property once selected, that property must be valued and taxed at equal rate. This is the whole extent of that limitation."

Crawford *v.* Lynn Co. (1884), 11 Ore. 482, 492.

Pennsylvania, Art. IX, Sec. 1. All taxes shall be uniform upon the same class of subjects, . . .

Commonwealth *v.* Edgerton Coal Co. (1894), 164 Pa. State, 284, 304.

Rhode Island, Art. I, Sec. 2. . . . All laws should be made for the good of the whole; and the burdens of the State ought to be fairly distributed among its citizens.

"We will not stop to notice the very general language and declaratory form of this clause; setting forth principles of legislation rather than rules of constitutional law — addressed rather to the general assembly by way of advice and direction than to the courts by way of enforcing restraint upon the law-making power."

In the Matter of Dorrance Street (1856), 4 R. I., 230, 249.
Crafts *v.* Ray (1900), 22 R. I. 179.

"It is obvious that there is no specific provision that taxation shall be uniform and equal, expressed in the Constitution of this State, and it is equally obvious that it is not our province to determine what ought to be there, but is not there."

State *v.* McCrillis (1907), 28 R. I. 165, 171.

Under the constitutional provisions that public burdens ought to be fairly distributed, if a town wilfully omits to include in the list of ratable property certain property liable to tax the whole assessment is illegal.

McTwiggan *v.* Hunter, 18 R. I. 776.

South Carolina, Art. I, Sec. 6. All property subject to taxation shall be taxed in proportion to its value.

Art. X, Sec. 1. The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, . . .

Taxes must be uniform.

State *v.* Railroad Corporations (1873), 4 S. C. 376.
Ætna Fire Insurance Co. *v.* Jones (1907), 78 S. C. 445.

South Dakota, Art. VI, Sec. 2. All taxes shall be uniform on all property and shall be levied and collected for public purposes only. The value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her, or its property.

Art. VI, Sec. 17. No taxes or duty shall be imposed without the consent of the people or their representatives in the Legislature and all taxation shall be equal and uniform.

The courts held that the uniformity required by the Constitution means uniformity as to the same class of property.

In re Watson (1903), 17 S. D. 486, 494.
Savings Bank *v.* Minnehaha County (1912), 29 S. D. 146, 163.

Tennessee, Art. II, Sec. 29. . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value.

See Reelfoot Lake Levee District *v.* Dauson (1896), 97 Tenn. 151.

Texas, Art. VIII, Sec. 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, . . .

Art. VIII, Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, . . .

It is doubtful whether classification is permitted for purposes of taxation.

See Texas Banking Co. *v.* State (1875), 42 Texas, 636, 639.
M. K. T. Ry. Co. *v.* Shannon (1907), 100 Texas, 379, 392.

Utah, Art. XIII, Sec. 2. All property in the State not exempt under the laws of the United States or under this Constitution shall be taxed in proportion to its value, to be ascertained as provided by law.

Art. XIII, Sec. 3. The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, . . . so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property.

Taxation must be uniform.

Judge *v.* Spencer (1897), 15 Utah, 242.

VERMONT, Chap. 1, Art. IX. That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expence, of that protection, and yield his personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken from him and applied to public uses, without his consent, or that of the representative body of free men . . .

"The provision requiring a proportional contribution cannot be restricted to any particular subject of taxation, for it relates to the entire burden cast upon the taxpayer. It provides that the expenses of government shall be apportioned equally, and not merely that exactions levied upon property shall be equal. . . . We think our constitutional requirement of proportional contributions for the support of the government was not intended to restrict the State to methods of taxation that operate equally upon all its inhabitants, regardless of the variety and measure of the advantages derived from its protection and regulation."

In re Hickok's Estate (1906), 78 Vt. 259, 264, 265.

VIRGINIA, Art. XIII, Sec. 168. All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, . . .

WASHINGTON, Art. VII, Sec. 1. All property in the State, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law.

Art. VII, Sec. 2. The Legislature shall provide by a uniform and equal rate of assessment a taxation on all property in the State, according to its value in money . . . so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: . . .

Taxes must be uniform and equal.

Andrews *v.* King County (1890), 1 Wash. 46.
State *v.* Cameron (1916), 90 Wash. 407, 412.

WEST VIRGINIA, Art. X, Sec. 1. Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; . . . The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.

See Bridge Company *v.* County Court (1896), 41 W. Va. 658, 673.

WISCONSIN, Art. VIII, Sec. 1. Rules of taxation shall be uniform and taxes shall be levied upon such property as the Legislature shall prescribe.

"For the direct method of taxing property, taxation on property so called, as to the rule of uniformity, there can be but one constitutional class. All not included therein must be absolutely exempt from such taxation. . . . Privilege taxes, though indirect taxes on property, are not taxation of property."

C. & N. W. Ry. Co. *v.* State (1906), 128 Wis. 553, 603–604.

WYOMING, Art. I, Sec. 28. . . . All taxation shall be equal and uniform.

Art. XV, Sec. 11. All property, except as in this Constitution otherwise provided, shall be uniformly assessed for taxation, . . .

Taxation is sufficiently uniform if all members of the same class are taxed alike.

State *v.* Willingham (1900), 9 Wyo. 290.

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BULLETIN No. 21

METHODS OF BORROWING
SINKING FUND v. SERIAL BONDS

With Special Reference to Massachusetts Practice

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METHODS OF BORROWING — SINKING-FUND *v.* SERIAL BONDS.

With Special Reference to Massachusetts Practice.

I. Definitions.

When a State or a municipality borrows money by the issue of bonds it may do so in one of two ways. It may sell a designated number of bonds all of which mature on the same date, twenty, thirty or fifty years hence, as the case may be. In this case the repayment of the principal is ordinarily secured by making annual contributions to a sinking fund which, with the accumulations from its investment, will be sufficient to amortize the principal when it falls due for repayment. Bonds thus secured are commonly called *Sinking Fund Bonds.* Or it may, on the other hand, issue a series of bonds in such a way as to make one or more of the bonds become payable in each successive year, the last bond in the series maturing twenty, thirty or fifty years hence, as the case may be. No sinking fund is required in this event; each year a sufficient sum of money is raised from revenues to pay off the bonds which fall due in that year. Bonds of this sort are commonly called *Serial Bonds.* It is not necessary that a uniform amount of serial bonds be made to fall due each year. The serials may be so arranged that more will mature in later years than in earlier or even so that none at all mature in the years immediately following the issue of the bonds.

II. Policy of the National Government.

The National Government has not hitherto pursued the policy of issuing bonds on the serial payment plan, nor has it, except in rare instances, made any provision for the creation of sinking funds. Where such provision has been made, moreover, it has not been scrupulously followed. A recent pronouncement

from the Secretary of the Treasury indicates, however, that the serial payment plan may soon receive recognition in the borrowing policy of the nation.

"I do not hesitate to say," wrote Secretary McAdoo on June 5, 1917, "that I have never regarded with favor the sinking fund idea with respect to public loans. The serial method I regard as far superior. Of course, the question of serial issues must depend upon the situations that have to be met. . . .

"In the future financial operations of the Government, issues of serial bonds as far as it is practicable to adjust them to the necessities of the case, and as far as it seems wise to adopt them as a matter of policy, will be made." [1]

III. Methods of State Borrowing in the United States.

A few States of the Union pursue the policy of borrowing by the issue of bonds which mature together at a distant date without making any provision for the repayment of the principal by means of sinking funds. These States expect to refund their indebtedness as it matures by new issues of bonds. Examples are Alabama, Louisiana, Mississippi and North Carolina. Most of the remaining States protect their bond issues, either in whole or in part, by sinking funds. In the total outstanding direct and contingent indebtedness of Massachusetts, there is only one loan for the repayment of which no definite provision has been made. This is the indebtedness incurred under the provisions of Chapter 121 of the Acts of 1907, amounting to $219,000. This loan is repayable in any year at the option of the Treasurer and Receiver-General, but no sinking fund has been established to amortize it at any future time.

The requirement that only serial bonds shall be issued by a public authority appears in the constitution of only one State of the Union, namely, Arkansas, where the provision applies only to municipal bonds.[2]

[1] *Boston Daily Advertiser*, June 8, 1917.

[2] This provision was proposed by initiative petition and adopted by the voters of Arkansas in 1913 as an amendment to Article xvi, Section 1.

IV. The New York Proposals.

The New York Constitutional Convention of 1915 unanimously adopted a proposal for a constitutional amendment requiring the use of the serial plan in the case of all future bond issues by the State.[1] The text of this proposed amendment is as follows:

> Except the debts specified in sections two and three of this article, all debts contracted by the State after the second day of November, one thousand nine hundred and fifteen, pursuant to an authorization therefor heretofore or hereafter made and each portion of any such debt from time to time so contracted irrespective of the terms of such authorization, shall be paid in equal annual instalments, the first of which shall be payable not more than one year, and the last of which shall be payable not more than fifty years, after such debt or portion thereof shall have been contracted. No such debt hereafter authorized shall be contracted for a period longer than that of the probable life of the work or object for which the debt is to be contracted, to be determined by general laws, which determination shall be conclusive. (Proposed New York Constitution, 1915, Article IX, Sect. 4.).

An amendment was also proposed by the New York Convention requiring the serial plan of borrowing for municipalities which reads as follows:

> The Legislature shall provide for the method and limitations under which debts may be contracted by the cities, counties, towns, villages and other civil divisions of the State to the end that such debts shall be payable in annual instalments the last of which shall fall due and be paid within fifty years after such debt shall have been contracted and that no such debt shall be contracted for a period longer than the probable life of the work or object for which the debt is to be contracted. (Proposed New York Constitution, 1915, Article XI, Sect. 12.)

The arguments set forth in the Convention in favor of this action may be found in Publication No. 5 of the Committee for the Adoption of the Constitution of the New York Constitutional Convention entitled "Saving the State's Money," by H. L. Stimson, Chairman of the Committee on Finance in that Convention.

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[1] The Convention also adopted a proposal of amendment permitting the Legislature to provide by general law for the conversion of outstanding sinking-fund bonds into serial bonds. See p. 168.

V. Massachusetts Legislation and Practice.

As a matter of actual practice the issue of serial bonds, whether by States or municipalities, is a relatively recent development in public finance. The plan has, however, spread with considerable rapidity, and Massachusetts more than any other State has led the way. This Commonwealth is, so far as can be ascertained, the only one which by statute makes the use of the serial plan mandatory for all municipal and State borrowing whatsoever. A brief sketch of the development in Massachusetts may accordingly be of interest.

Fourteen years ago, by Chapter 226 of the Acts of 1903, the Treasurer and Receiver-General was empowered, with the approval of the Governor and Council, to issue bonds on the serial plan "whenever he shall deem it to be for the advantage of the Commonwealth so to do." This act, however, made a special exception in the case of loans on account of the metropolitan districts (Section 3). Two years later, by Chapter 169 of the Acts of 1905, this exception was eliminated, and the Treasurer of the Commonwealth was given thereby the same option both as regards "direct" State loans and metropolitan district or "contingent" loans.

In 1912 another statute dealing with the subject was enacted (Chapter 3 of the Acts of 1912), the essential provisions of which were as follows:

Section 1. The Treasurer and Receiver General shall issue all bonds or scrip of the Commonwealth, now or hereafter authorized, upon the serial payment plan. The said plan shall provide for the issue of bonds or scrip to be paid serially in such amounts and at such times as shall be determined by the Treasurer and Receiver General, with the approval of the Governor and Council, to be for the best interests of the Commonwealth; the bond last payable in any such issue to become due at a date not later than the time named in the act.

Section 2. The Treasurer and Receiver General shall annually certify to the Auditor of the Commonwealth the amount necessary to be included in the State tax to provide for such serial payments on account of any bonds or scrip of the Commonwealth, which amount shall be included in the State tax ordered to be assessed for the year in which such payments are to be made.

Section 3. On all bonds or scrip that have been or may hereafter be issued for the benefit of any of the metropolitan districts, so-called, the

Treasurer and Receiver General shall assess upon the said metropolitan districts annually amounts necessary for the payment of the serial bonds falling due, and shall collect the same in the same manner as assessments for sinking fund purposes are collected. . . .

By the provisions of this statute the issue of bonds on the serial payment plan ceased to be within the discretion of the Treasurer and became mandatory. Prior to the passage of the act, however, the issue of such bonds had become a settled policy. No sinking fund bonds either directly on the account of the State or on account of the metropolitan districts have been issued since 1910.

The total of the bonds issued upon the serial payment plan at the end of the fiscal year 1915–16 (November 30, 1916) was as follows: —

Direct debt,	$18,021,868 73
Contingent debt,	3,867,131 27
Total,	$21,889,000 00

VI. The Use of the Serial Plan by Massachusetts Municipalities.

(*a*) *In General.*

By Chapter 27 of the Revised Laws (Section 13) as amended by Chapter 341 of the Acts of 1908 (Section 1)[1] and Chapter 350 of the Acts of 1911 (Section 13), the municipalities of the Commonwealth have since 1882 been permitted to issue serial bonds. (See Chapter 133, Acts of 1882.) But many of them did not avail themselves of this permissive authority. The situation in 1910 as respects the municipalities of the Commonwealth was thus stated in the "Report of a Special Investigation Relative to the Sinking Funds and Serial Loans of the Cities and Towns of the Commonwealth" made by the Director of the Bureau of Statistics (House Document No. 2162, 1913):

The total gross funded or fixed debt of the cities and towns of the Commonwealth at the close of the fiscal year corresponding most nearly to the calendar year 1910 was $238,592,264.82, of which $179,648,636.72 was of a

[1] This section is in part repealed by the provisions of section 199 of chapter 742, *Acts of 1914*.

character which may be described as sinking fund debt, *i.e.*, debt to be paid at maturity from the accumulations in funds established for the purpose. Of this amount $171,459,407.96 represented the indebtedness of 25 of the 33 cities payable from sinking funds and $8,189,228.76 represented the indebtedness of 60 of the 321 towns payable from sinking funds. Eight cities (Chicopee, Gloucester, North Adams, Pittsfield, Quincy, Salem, Somerville, and Woburn) have no sinking fund indebtedness, their outstanding fixed debt being all on the serial basis. Of the 261 towns having no sinking funds, 46 were without any funded or fixed debt, while the indebtedness of the remaining 215 was partly on a correct serial basis, partly represented by demand notes, and partly consisted of time loans issued without provision having been made for annual payments, or liabilities created by the use of trust funds without written evidence of the same having been given.

(*b*) *Boston.*

In a report of the Boston Finance Commission, dated January 30, 1909, the recommendation was made that the "dangers inherent in the (sinking fund) system seem to the Commission so great as to require the discontinuance of this system by the city and the borrowing of money in the future in such manner as will make the provision and accumulation of a sinking fund unnecessary. This can be accomplished by adopting the ordinary serial or annual payment form of bond. . . ." (Reports, II, pp. 164–165.)

In accordance with this recommendation the amended charter of the city of Boston (Chapter 486, Acts of 1909) provided (Section 26) that:

> All loans made by the city after the passage of this act shall be made payable in annual installments in the manner authorized by section thirteen of chapter twenty-seven of the Revised Laws as amended by section one of chapter three hundred and forty-one of the acts of the year nineteen hundred and eight. No sinking fund shall be established for said loan. . . .

Since 1909 no sinking fund bonds except rapid transit bonds have been issued by the city of Boston.

(*c*) *The Municipal Finance Act.*

In 1912 the Legislature established a joint special (recess) committee on municipal finance, and from the report of this committee (House Document No. 1803, 1913) the following excerpt on the matter of municipal borrowing methods is taken:

The committee is firmly convinced that the serial payment method is preferable to sinking funds in that it is simpler, it does not involve the problems of administration or the complicated mathematical computations required in keeping an accurate accounting of sinking funds, and while perhaps during the first year or two of its operation it may entail heavier annual assessments, in the end it reduces the cost of the improvement for which the debt is incurred below that which would have to be paid under the sinking fund method.

The committee believes that the serial payment provisions of law should require specifically that payments should begin on the first anniversary of the issue of the notes or bonds.

On the recommendation of this recess committee the Municipal Finance Act of 1913 (Chapter 719, Acts of 1913, Section 14) provided that:

Cities and towns shall not issue any notes payable on demand, and they shall provide for the payment of all debts, except those incurred under the provisions of sections three, four and nine, by such annual payments as will extinguish the same at maturity, and so that the first of such annual payments on account of any loan shall be made not later than one year after the date of the bonds or notes issued therefor, and so that the amount of such annual payments in any year on account of such debts, so far as issued, shall not be less than the amount of principal payable in any subsequent year, and such annual amount, together with the interest on all debts, shall, without further vote, be assessed until the debt is extinguished.

The Legislature has thus prescribed a definite type of serial bond issues for all the municipalities of the Commonwealth.

VII. Relative Merits of the Sinking Fund and Serial Plans of Public Borrowing.

(*a*) *Economy.*

It has not been demonstrated that either the sinking fund or the serial bond plan is the cheaper under all circumstances.

Given the same assumptions as to rates of interest and accumulation, the aggregate payments will be the same under either plan. . . If the sinking funds are assumed to accumulate at a rate greater than the rate of interest on the bonds, the advantage is with the sinking-fund system; but if the rate of accumulation in the sinking fund is assumed to be less than that paid for interest on the bonds, the serial system will cost less. The proper assumption to make is, of course, that the two rates are the same;

and on this hypothesis the aggregate cost to the community is exactly the same by either plan. A million dollar, three per cent, twenty-year loan, for instance, involves on the serial plan direct payments by the city, on account of principal and interest, of $1,315,000, while on the sinking fund plan the payments would amount to $1,334,426. This is not the whole story, however, for in the earlier period of the loan the payments on the sinking fund plan are less than on the serial plan, while in the later years the converse is the case, and the value (or aggregate interest) of the differences, compounded at three per cent, amounts to $31,461 on the sinking fund plan as against $12,035 on the serial plan — a difference of $19,426, which exactly offsets the difference between the direct payments by the city on the two plans.[1]

Under exactly similar assumptions the cost of the two plans should be the same. In actual practice, however, the conditions invariably favor the serial plan. It should be remembered in this connection that the sinking fund plan cannot make its proper showing unless the funds are promptly invested and continuously kept invested at a rate of interest at least as high as that paid on the bonds. This is a condition which in actual operation is almost never fulfilled. In the financial reports of New York City for the present week (ending May 19, 1917) the amount of sinking fund money uninvested is given as $9,561,349.60.

(*b*) *Certainty.*

It is claimed by the advocates of the serial bond plan that the exact annual cost of a loan issued under that arrangement can be determined at the outset for the entire period, whereas the contributions to the sinking fund must be calculated year by year. Until ten or fifteen years ago, the financial officers of the Commonwealth followed the practice of determining at the time of the original issue of the bonds the amount to be paid into the sinking fund each year. This amount was paid in annually regardless of whether the fund was by the accretion of interest accumulating faster or slower than was originally calculated. Nor was any heed paid under this plan to the fact that from time to time unexpended balances from appropriations were "covered into" the sinking fund. The result was that some funds, when the time came to pay off the bonds,

[1] Nathan Matthews, *Municipal Charters*, pp. 62–63.

held more than enough while others held too little.[1] The present practice is to compute anew each year the contribution which every sinking fund requires. Not until this computation is made can the exact burden for the year be ascertained, although the annual variations, to be sure, are not usually great. Not until the end of the term, therefore, can it be stated to a dollar just how much a loan under the sinking fund plan has actually cost the community.

In the municipal sinking funds of Massachusetts the Director of the Bureau of Statistics reported in 1913 that in fifty-two instances in forty different cities and towns the sinking funds were found to be deficient, the total deficiency being $1,794,-391.58. On the other hand, forty-seven cities and towns had sinking funds showing a surplus, the total surplus being $2,855,-192.37.[2] It is apparent, therefore, that even annual computations do not insure exactness.

(c) *Safety.*

It is evident that under the sinking fund plan large amounts of money and securities are in the custody of a few officials. The total sinking funds of the Commonwealth (including those for the amortization of the metropolitan districts debt at maturity) amount to about $40,000,000. These funds have been carefully and efficiently administered in the past, yet the experience of other States and even of cities within the Commonwealth indicates that there are possibilities of mishap.

The reports of the Boston Finance Commission contain the following comments upon Boston's experience with sinking funds in the years preceding 1909: —

> In 1880 a defalcation occurred in the office of the City Treasurer, and to hide his stealings the then cashier had been shifting balances from the sinking funds to the regular treasury account and *vice versa*.
>
> Since 1899 three local institutions, holding $347,985 of sinking funds money, have failed, and in each instance an officer of the failed bank was at the time a member of the Board of Sinking Fund Commissioners. While it is true that the depositors of these institutions were paid in full, yet the

[1] By Chapter 3 of the *Acts of 1913* (Section 5) the Treasurer and Receiver-General was authorized to apply a surplus in any sinking fund to any other sinking fund in which there should happen to be a deficiency.

[2] *Report of a Special Investigation relative to the Sinking Funds and Serial Loans of the Cities and Towns of the Commonwealth*, House Doc. No. 2162 (1913), 17.

experience of the city in the future may not be so fortunate, and large losses may at any time be incurred.

Banks in which individual commissioners were interested have been favored in the matter of deposits, and have at times received amounts out of proportion to their strength and standing.

Some years ago the sum of $700,000 was loaned by the Sinking Fund Commission to a single corporation in which a member of the commission was a director.[1]

Experience in other States also shows that sinking fund moneys have sometimes been devoted to other purposes to meet temporary emergencies and have not been restored; that inadequate contributions have been made in some years under pressure of demands from other quarters; that losses have taken place through unwise investments; and that many sinking funds have not proved sufficient to provide for the repayment of their bonds at maturity.

(*d*) *Distribution of Burden.*

Under the sinking fund plan the aggregate amounts included in the tax levy for interest and payments into sinking fund are uniform each year throughout the term of the loan; in other words the burden of each loan upon the taxpayers is distributed uniformly over twenty, thirty or forty years, as the case may be. Under the serial plan it may be provided that the payments of principal shall be so adjusted that the aggregate payment each year for principal and interest shall be the same (see Chapter 341, Acts of 1908, and Chapter 486, Acts of 1909, Section 26). In that case the distribution of the burden is uniform as in the case of the sinking fund plan. Or it may be provided (see Chapter 133, Acts of 1882) that the annual payments of principal shall be equal, in which case (the interest payments growing gradually less each year) the burden is heaviest in the first year of the loan period and lightest in the last. Or, as a third alternative, some public authority may be empowered to determine at the outset what portion of the principal shall be repaid each year (see Chapter 226, Acts of 1903, and Chapter 3, Acts of 1912), in which case the burden may be distributed at discretion. All three methods, as has

[1] *Reports of the Boston Finance Commission*, II, 162.

been indicated, have been used in Massachusetts. Two of them permit flexibility in the distribution of the burden, enabling the "peak of the load" to be placed either in the earlier or later or middle years of the loan period as may be desired. It has occasionally been urged that this flexibility is desirable. In the case of some improvements (such as a public building) the maximum usefulness comes in the early years; in others (such as a public park) it may not be reached for twenty years or more; in still others (such as land acquired for streets) the degree of usefulness may be uniform. The burden, it has been argued, should be levied in proportion to the advantage derived.

(*e*) *Attractiveness to Investors.*

Opinions differ as to whether sinking fund bonds or serial bonds are more attractive to investors. Neither seem to have a marked advantage under all circumstances. So far as the experience of Massachusetts goes there has appeared to be no distinct preference for one over the other, although serials seem at present to be slightly the more in favor with investors.

VIII. The Conversion of Sinking Fund Bonds into Serial Bonds.

Since the years 1912–13, when the serial plan of borrowing was made mandatory for all future borrowings both by the Commonwealth of Massachusetts and by its municipalities, there have been proposals for the conversion of all outstanding sinking fund bonds by the issue of serial bonds. The refunding of the Commonwealth's sinking fund bonds in this way was recommended to the Governor by the Treasurer and Receiver-General in 1914, and this recommendation was transmitted by Governor Walsh to the Legislature on July 1 of that year. The Legislature, by Chapter 157 of the Resolves of 1914, referred the matter to the Commission on Economy and Efficiency for examination and report.

In compliance with this resolve the Commission on Economy and Efficiency submitted to the General Court, on January 15, 1915, a report (House Document No. 1650) which covered the

merits of the question fully and concluded with the following expression of opinion:

> In conclusion, the Commission is of the opinion that the refinancing of the sinking fund debt by the issuance of serial bonds presents practical difficulties which could not be overcome with benefit or economy to the State unless it is desirable to burden the years of the immediate future with a large increase in the State tax; and we are further of the opinion that even then the accomplishment of beneficial results is problematical. . . .[1]

The New York Constitutional Convention of 1915, however, regarded the advantages of conversion so highly that it unanimously adopted the following proposal of amendment:

> The Legislature may also by general laws provide means and authority whereby the outstanding bonds of the State, for which sinking funds are provided, may be exchanged at par for cancellation, for serial bonds of the form authorized under section four of this article,[2] upon such terms and conditions as to interest or otherwise as it may in its discretion authorize or determine, except that the debt as thus refunded shall finally mature no later and at no greater comparative cost to the State than the original debt; the determination of the Legislature as to such comparative cost shall be conclusive. No further contributions to the respective sinking funds shall be made on account of bonds so exchanged and the proportion of any such sinking fund which the amount of the bonds so exchanged shall bear to the amount of the bonds outstanding of the same issue may be appropriated, as required, for the payment of the substituted serial bonds.[3]

IX. Summary.

A summary of the more important points in the foregoing discussion may be of service:

1. Only one State (Arkansas) has provided in its constitution for the compulsory use of the serial plan by any public authority, and in this case the application is to municipal bond issues only.

2. The New York Constitutional Convention of 1915 unanimously adopted a much wider provision, covering State as well as municipal bond issues, but it did not become operative

[1] A criticism of this conclusion may be found in *A Review of the Report (House Doc. No. 1659), dated January 15, 1915, of the Commission on Economy and Efficiency on Refunding by Serial Bonds the Outstanding Sinking Fund Bonds of the State of Massachusetts*, by Alfred D. Chandler, of the Massachusetts Bar.

[2] Printed *ante*, 159.

[3] *Proposed Constitution of New York*, Article IX, Section 5.

because the people rejected the new draft of a constitution in which this provision was incorporated.

3. The use of the serial plan of borrowing is by statute made mandatory in Massachusetts both for State and municipal bond issues, with a few exceptions.

4. In the case of municipal borrowing the law rigidly circumscribes the discretion of the municipal authorities as to the form of serial issue which may be used; in the case of State borrowing this is left to the discretion of the Treasurer and Receiver-General, with the approval of the Governor and Council.

5. The serial plan has been found by a Joint Special Committee of the Massachusetts Legislature to be distinctly preferable to the sinking fund plan of borrowing.

6. The conversion of the Commonwealth's sinking fund bonds, at present outstanding, into serial bonds, was adversely reported upon by the Commission on Economy and Efficiency two years ago.

7. The New York Constitutional Convention of 1915 unanimously favored an amendment permitting the Legislature to provide for conversion in that State by general law.

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BULLETIN No. 22

MUNICIPAL OWNERSHIP IN THE UNITED STATES

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MUNICIPAL OWNERSHIP IN THE UNITED STATES.

I. Definition.

The term municipal ownership as commonly used includes both the ownership and operation of public utilities or other services which have a direct bearing upon the public health or convenience, such as waterworks, lighting and heating plants, street railways, ferries, docks and wharves, markets and so on. In some cases there may be ownership without operation, as in Philadelphia, where the city owns the gas plant but has leased it to a private company for maintenance and management. Such an arrangement, however, is exceptional, so that for all general purposes municipal ownership may be regarded as including direct operation by the city as well as ownership.

II. Arguments for and against Municipal Ownership.

The arguments generally advanced in favor of municipal ownership are: (1) that such public service enterprises as waterworks, lighting plants, street railways, markets, etc., are so closely connected with the public health or convenience as to be proper municipal functions; (2) that lower rates and better service can be obtained by public ownership than under private ownership, especially in the case of those public utilities which are monopolistic in character; and (3) that there is a considerable social gain, since the wages and hours of labor are more advantageous in municipal plants and employment is more regular. Against municipal ownership it is argued: (1) that publicly owned plants are less efficient than private enterprises since the incentive of profit is removed and also because of political influences; (2) that municipal ownership furnishes an opportunity for corruption; (3) that the burden of public ownership is oftentimes borne by the general tax payers instead of by the consumers because of the unbusinesslike financial

methods and accounting systems that are used by some cities. Finally it is claimed that municipal ownership is not the only solution of the public utility problem, but that there is another alternative which would protect the public — namely, private ownership with public regulation by a commission or other administrative authority.

Conclusions of the National Civic Federation's Commission on Public Ownership and Operation.

In 1905 the National Civic Federation appointed a commission on public ownership made up of representatives from both sides of the question. After a long and careful study of the problem in this country and Europe, the committee reached the following conclusions: [1]

Public utilities, whether in public or private hands, are best conducted under a system of legalized and regulated monopoly.

Public utilities in which the sanitary motive largely enters should be operated by the public.

The success of municipal operation of public utilities depends upon the existence in the city of a high capacity for municipal government.

The committee takes no position on the question of the general expediency of either private or public ownership. The question must be solved by each municipality in the light of local conditions. What may be possible in one locality may not be in another. In some cities the companies may so serve the public as to create no dissatisfaction, and nothing might be gained by experimenting with municipal ownership. Again, the government of one city may be good and capable of taking charge of these public utilities, while in another it may be the reverse. In either case the people must remember that it requires a large class of able men as city officials to look after these matters. They must also remember that municipal ownership will create a large class of employees who may have more or less political influence.

Our investigations teach us that no municipal operation is likely to be highly successful that does not provide for:

First. — An executive manager with full responsibility, holding his position during good behavior.

Second. — Exclusion of political influence and personal favoritism from the management of the undertaking.

Third. — Separation of the finances of the undertaking from those of the rest of the city.

[1] National Civic Federation, *Report on Municipal and Private Operation of Public Utilities.* 3 vols. New York, 1907. Part I, Vol. I, pp. 23–26. The arrangement of the above conclusions has been changed for purposes of clearness.

Fourth. — Exemption from the debt limit of the necessary bond issues for revenue-producing utilities, which shall be a first charge upon the property and revenues of such undertaking.

There are no particular reasons why the financial results from private or public operation should be different if the conditions are the same. In each case it is a question of the proper man in charge of the business and of local conditions.

We have come to the conclusion that municipal ownership of public utilities should not be extended to revenue-producing industries which do not involve the public health, the public safety, public transportation, or the permanent occupation of public streets or grounds, and that municipal operation should not be undertaken solely for profit.

We are also of the opinion that all future grants to private companies for the construction and operation of public utilities should be terminable after a certain fixed period, and that meanwhile cities should have the right to purchase the property for operation, lease or sale, paying its fair value.

To carry out these recommendations effectively and to protect the rights of the people, we recommend that the various States should give to their municipalities the authority, upon popular vote under reasonable regulations, to build and operate public utilities, or to build and lease the same, or to take over works already constructed. In no other way can the people be put upon a fair trading basis and obtain from the individual companies such rights as they ought to have. We believe that this provision will tend to make it to the enlightened self-interest of the public utility companies to furnish adequate service upon fair terms, and to this extent will tend to render it unnecessary for the public to take over the existing utilities or to acquire new ones.

Franchise grants to private corporations should be terminable after a fixed period and meanwhile subject to purchase at a fair value.

Municipalities should have the power to enter the field of municipal ownership upon popular vote under reasonable regulation.

Private companies operating public utilities should be subject to public regulation and examination under a system of uniform records and accounts and of full publicity.

Furthermore, we recommend that provision be made for a competent public authority, with power to require for all public utilities a uniform system of records and accounts, giving all financial data and all information concerning the quality of service and the cost thereof, which data shall be published and distributed to the public like other official reports; and also that no stock or bonds for public utilities shall be issued without the approval of some competent public authority.

A more recent statement as to the advisability of municipal ownership from the standpoint of city officials is that expressed by the Conference of American Mayors at Philadelphia in 1914.

This body unanimously recommended that "no general conclusion be formulated upon the abstract question of municipal ownership but rather we express our judgment to be that municipalities should be given in all instances, the power to municipalize public utilities, the expediency of its exercise being at any time and place, and with regard to any particular utility, a matter for local determination."[1]

III. Development and Present Status of Municipal Ownership.

Municipal Ownership of Waterworks.

Municipal ownership in the United States has had its widest application in the case of waterworks, the development in this field following very closely the growth of cities. In 1800, out of sixteen public water supplies in this country only one was municipally owned; by 1825 the number of municipal plants had increased to about one-sixth of the total; while in 1875 over one-half of the waterworks were owned by cities. During the period from 1875 to 1890 the movement slackened somewhat because of the large expenditures for other improvements. By 1890, however, city finances were in better condition and there was renewed activity in the direction of municipal ownership so that by 1897 only nine of the fifty largest cities in the United States were supplied by private companies.[2]

Since 1900, municipal ownership of waterworks has continued to spread even more rapidly until to-day all but seven of the sixty-two cities of over 100,000 population own and operate water plants, while only forty-two of the one hundred and forty-two cities of from 30,000 to 100,000 are supplied by private plants. The cities of over 100,000 which do not have municipal plants are Indianapolis, Oakland, New Haven, Scranton, Paterson, Bridgeport and San Antonio.[3] The rapid spread of municipally owned water supplies during the last

[1] "Proceedings of the Conference of American Mayors on Public Policies as to Municipal Utilities, Philadelphia, 1914." In *The Annals of the American Academy of Political and Social Science*, LVII, 295 (1915).

[2] A historical sketch of waterworks development by M. N. Baker may be found in E. W. Bemis's *Municipal Monopolies* (New York, 1899), Chap. 1. See also National Civic Federation, *Report on Municipal and Private Operation of Public Utilities*, Part I, Vol. 1, pp. 127–146, and U. S. Commissioner of Labor, *Fourteenth Annual Report, 1899*, pp. 12–13.

[3] U. S. Bureau of the Census, *Financial Statistics of Cities, 1915*, Table 15, pp. 215–217.

generation is also shown by the fact that during the period from 1880 to 1912 the total amount of city indebtedness for public water systems more than quadrupled. In fact, cities incurred larger debts for waterworks during this period than for either highways or education or any other single purpose.[1]

In certain States municipal ownership of waterworks is almost universal, as in Massachusetts, where all of the thirty-five cities and fifty-eight of the seventy towns of more than 5,000 inhabitants own and operate water systems. At the present time only five per cent of the total population provided with water supplies in Massachusetts is supplied by private companies.[2] In North Carolina every city and town with a population of 5,000 or over except one owns and operates its waterworks,[3] and in Iowa, three hundred and ten out of three hundred and thirty cities have municipally owned water systems.[4] In Minnesota, one hundred and fifty-three cities with a population of about 900,000 have undertaken the ownership of waterworks, while only eight cities, with a population of 26,359, are supplied by private companies.[5] Thus it is seen that municipal ownership of waterworks has become the general practice in American cities. The extent of municipal ownership in this field is attributed primarily to the vital necessity of an abundant and pure water supply for the protection of the public health and incidentally to the need of an adequate supply for fire purposes.

Municipal Ownership of Lighting Plants.

While the movement for municipal ownership of waterworks had its origin during the early part of the nineteenth century, public ownership of gas and electric lighting plants is of much more recent development and has not been so widely adopted. At the present time only five of the cities with a population of over 30,000 own gas works, namely, Richmond, Virginia, Wheeling, West Virginia, Duluth, Minnesota, Holyoke, Massa-

[1] Fred E. Clark, "The Purpose of the Indebtedness of American Cities," *Municipal Research*, No. 75, July, 1916 (New York Bureau of Municipal Research, N. Y., 1916), pp. 27–30.

[2] See *post*, pp. 20–21.

[3] *American Year Book, 1916*, p. 293.

[4] *National Municipal Review*, II, 476 (1913).

[5] G. A. Gesell, "Minnesota Public Utility Rates," *Bulletin of the University of Minnesota*, October, 1914 (Minneapolis, 1914), pp. 1–4.

chusetts, and Hamilton, Ohio.[1] Altogether there are about thirty municipal gas plants in the United States as compared with about fourteen hundred private plants, but most of them are in small cities and towns. About eighty other small municipalities have public plants using acetylene, gasolene or natural gas.[2]

Philadelphia is the largest city in which municipal ownership of the gas supply has been undertaken, but in 1897 the city discontinued the policy of direct municipal operation and leased the plant for a term of thirty years to the United Gas Improvement Company, which has managed it ever since. This change in policy has been regarded by some as an indication of the failure of the municipalization of gas supplies on a large scale; by others it is said that operation of the plant was abandoned because of the interference of the City Council and because of burdens inherited from the earlier régime when the works were operated by a self-perpetuating body of trustees.[3]

The number of municipally owned electric lighting plants is somewhat larger than in the case of gas plants. There are more than fifteen hundred electric lighting plants now owned and managed by municipalities as compared with about thirty-six hundred in private hands.[4] Most of these plants, however, are in small communities, as is shown by the fact that only twenty of the two hundred and four cities of over 30,000 own and operate electric lighting systems. The largest cities which own their light plants are Chicago, Cleveland, Columbus, Seattle, Tacoma, and Kansas City, Kansas.[5]

The development of municipal ownership of electric lighting plants in the United States is indicated by the following table, which shows that public ownership increased between 1902

[1] U. S. Bureau of the Census, *Financial Statistics of Cities, 1915*. Table 15, pp. 215–217.

[2] For statistics see Brown's *Directory of American Gas Companies*, 28th annual edition, 1915; also W. B. Munro, *Principles and Methods of Municipal Administration* (New York, 1916), pp. 258–259.

[3] Walton J. Clark and L. S. Rowe in the National Civic Federation's *Report on Municipal and Private Operation of Public Utilities*. 3 vols. New York, 1907. Part II, Vol. I, pp. 500–536, 588–664.

[4] U. S. Bureau of the Census, *Central Electric Light and Power Stations, 1912* (Washington, 1915), pp. 17–22.

[5] Cities of over 30,000 with electric lighting plants are Chicago, Cleveland, Cincinnati, Seattle, Columbus (Ohio), Birmingham, Tacoma, Kansas City (Kan.), Fort Wayne, Jacksonville (Fla.), Holyoke, Bay City, Lincoln, Pasadena, Hamilton (Ohio), Lansing, Taunton, Jamestown (N. Y.), Austin, Joplin. In Cincinnati and Birmingham, however, the plants are small ones.

and 1907 fifty-four per cent, and between 1907 and 1912 twenty-four per cent, while during the same periods private ownership increased only twenty-three per cent and six per cent repectively: [1]

	1902.	1907.	Increase (Per Cent), 1902-07.	1912.	Increase (Per Cent), 1907-12.
Municipal plants, . .	815	1,252	54	1,562	24
Private plants, . . .	2,805	3,462	23	3,659	6
Total number of plants,	3,620	4,714	30	5,221	11

Municipal Ownership of Transportation Facilities.

The cities of the United States have as yet had very little experience in the ownership and operation of street railways and other transportation facilities. San Francisco is the only large city that has taken over any considerable part of its street railway system. Seattle, Washington, and Munroe, Louisiana, also own a few miles of street railways,[2] while New Orleans owns and operates a small belt line. Mention should also be made of the fact that Boston and New York own extensive subway systems which have been leased to private companies for equipment and operation. Boston and New York, so far as can be determined, are the only large cities which own and operate municipal ferries.

The movement for public ownership of street railways in San Francisco began as early as 1902, but it was not until 1912 that the first municipal line was opened for service. The success of the initial venture in this field led the city to make further investments in street railways. In August, 1913, the people voted a bond issue of three and one-half million dollars for extensions and for the acquisition of four miles of track from a private company whose franchise had just expired. Finally, in order to provide adequate transportation facilities during the Panama-Pacific Exposition, the city constructed a

[1] U. S. Bureau of the Census, *Central Electric Light and Power Stations, 1912* (Washington, 1915), pp. 17–22.

[2] Evans Clark, "Municipal Ownership Development," in *The Public Utilities Magazine*, II, 30 (July, 1917).

tunnel so as to furnish rapid transit over the municipal lines from the heart of the city to the exposition grounds.[1]

During the year 1915 (the latest period for which complete statistics are available), the city of San Francisco operated over forty-three miles of single track railway, owned one hundred and ninety-seven cars and carried 40,369,865 passengers, while the net profits for the year were $82,135.30.[2] It is said that the chief obstacle in the way of the immediate municipalization of the entire system is the great value of the private franchises, most of which do not expire until some time in the future.

Another large city which has undertaken the ownership of transportation facilities is New Orleans, which owns and operates a double track belt line of more than eleven miles along the water front. The principal traffic is freight, and the system is also used for transporting garbage into the swamps.[3] The third city which has engaged in the traction business is Seattle, which in 1914 put into operation four miles of electric railway.[4] Munroe, Louisiana, also owns and operates a street railway system.

The question of public ownership of street railways has been seriously considered in several other cities including Chicago, Detroit, and Toledo. In 1907 the people of Chicago, by a vote of 165,846 to 132,720, approved of several ordinances which settled the complicated street railway franchise situation in that city and which provided that the municipality might at

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[1] *American Year Book, 1913*, p. 303; *1914*, p. 294.

[2] See *Financial Report of the Municipal Railway of San Francisco for the Fiscal Year ended June 30, 1915*, as prepared for and approved by the Finance Committee of the Board of Supervisors, pp. 5, 14. The following figures show the financial results for 1915: —

Passenger revenues,	$1,630,778 42
Miscellaneous,	7,886 01
Total revenue,	$1,638,664 43
Less operating expenses (including depreciation),	1,226,115 45
Net operating revenue,	$412,548 98
Add miscellaneous income,	10,407 56
Gross income less operating expenses,	$422,956 54
Less interest on funded debt, etc.,	340,821 24
Net profit,	$82,135 30

[3] *National Municipal Review*, II, 685–686 (1913).

[4] *Ibid.*, III, 775 (1914).

any time in the future purchase the existing system at a fixed price of $50,000,000 plus improvements.[1] In Detroit an amendment to the city charter was adopted in 1913 by a vote of 40,531 to 9,542 which provided for municipal ownership of the street railway lines. The contract which was subsequently drawn up to carry out this provision, however, failed to receive the necessary majority, so that no further action has been taken.[2] The question of municipalizing the street railways was also voted upon in Toledo, Ohio, in 1914 and approved by the narrow margin of 10,597 to 9,409. The final outcome of the situation, however, is uncertain, since the actual acquisition of the property cannot be consummated unless the necessary bond issues are later approved by a two-thirds vote of the people.[3]

Docks and Wharves.

Of the sixty-three principal ports of the United States, forty-one own docks and wharves. New York leads with the ownership of two hundred and forty-one docks and wharves valued at $138,839,102, Philadelphia with twenty-two, involving an investment of $14,070,255, Oakland with seventeen, Stockton, California, with sixteen, and Baltimore with twelve. Other important cities which own such facilities on a fairly large scale are New Orleans, San Francisco, Los Angeles, San Diego, Sacramento. In several other cities, including Boston, wharves and docks are owned by the State instead of by the municipality. In general it may be said that cities along the Pacific coast own a greater water frontage and more docks and wharves than the Atlantic, Gulf or Lake ports.[4]

Markets.

With the increase in the cost of living during the last few years there has arisen a great demand for municipal markets where farmers and small dealers may sell produce direct to

[1] Fairlie, J. A., *Essays in Municipal Administration*, 255–257.

[2] *National Municipal Review*, II, 477 (1913); III, 749–750 (1914); V, 104–105 (1916).

[3] *American Year Book, 1914*, pp. 294–295. Also *National Municipal Review*, III, 750–751 (1914).

[4] For details as to municipal ownership of docks and wharves see report by G. M. Jones on *Ports of the United States*, Miscellaneous Series, No. 33, United States Department of Commerce (Washington, 1916); also Evans Clark, "Municipal Ownership Development," in *The Utilities Magazine*, July, 1917, p. 30. For valuation, expenses, and revenues of docks and wharves, see U. S. Bureau of the Census, *Financial Statistics of Cities, 1915*, pp. 185–187, 215–217, 290–295.

consumers. Most of the early markets were merely open spaces in the city streets set aside for such purposes and known as "curbstone markets," but recently there has been a tendency to provide buildings located in a convenient part of the city with stalls which may be let to truckmen and retailers.

A committee of the National Municipal League which made an investigation of the subject during 1917 gives statistics regarding seventy-two cities of the country that have municipal markets, the most important of which are Boston, New York, St. Louis, Philadelphia, Baltimore, Cleveland, Cincinnati, New Orleans, and Washington.[1] Other cities than those included in the report of the committee own public markets, but most of them are smaller places.

As to the types of markets in the various cities, the figures show that fifty-six of the seventy-two cities have curbstone or open markets,[2] but it is significant that over half of these cities report buildings in addition to the open markets.[3] Next in popularity after the curbstone or open market is the combined wholesale and retail market. This combination includes some of the best and largest market buildings in the country,

[1] National Municipal League, "Public Markets in the United States." *Second Report of a Committee of the National Municipal League*, March 15, 1917 (Philadelphia, 1917).

Following is a list of the cities included in the Report of the Committee: Akron, Ohio, Albany, N. Y., Auburn, N. Y., Baltimore, Md., Boston, Mass., Buffalo, N. Y., Canton, Ohio, Chattanooga, Tenn., Cincinnati, Ohio, Cleveland, Ohio, Columbia, Pa., Columbus, Ohio, Dallas, Tex., Danville, Va., Dayton, Ohio, Denver, Col., Detroit, Mich., Dubuque, Iowa, Duluth, Minn., Eau Claire, Wis., Fort Wayne, Ind., Fresno, Cal., Galena, Kan., Grand Rapids, Mich., Great Falls, Mont., Hamilton, Ohio, Houston, Tex., Huntington, Ind., Ironton, Ohio, Jamestown, N. Y., Johnstown, Pa., Joplin, Mo., Kansas City, Mo., Knoxville, Tenn., Lancaster, Pa., Lansing, Mich., Marquette, Mich., Memphis, Tenn., Milwaukee, Wis., Mobile, Ala., New Albany, Ind., New Castle, Pa., New Orleans, La., New York, N. Y., Niagara Falls, N. Y., Norfolk, Va., Paducah, Ky., Pasadena, Cal., Perth Amboy, N. J., Philadelphia, Pa., Pittsburgh, Pa., Pittsfield, Mass., Portland, Ore., Portsmouth, Ohio, Rochester, N. Y., Salem, Mass., Salt Lake City, Utah, San Antonio, Tex., San José, Cal., Savannah, Ga., Seattle, Wash., South Bend, Ind., St. Joseph, Mo., St. Louis, Mo., Syracuse, N. Y., Tacoma, Wash., Toledo, Ohio, Traverse City, Mich., Trenton, N. J., Washington, D. C., Waterloo, Iowa, Youngstown, Ohio.

[2] The following are cities with markets of the curbstone or open type: Akron, Albany, Auburn, Baltimore, Brockton, Buffalo, Cedar Rapids, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Danville, Dayton, Denver, Detroit, Dubuque, Fresno, Galena, Grand Rapids, Hamilton, Huntington, Ironton, Jamestown, Johnstown, Kansas City, Knoxville, Lancaster, Lansing, Memphis, Milwaukee, New Castle, New Orleans, New York, Niagara Falls, Norfolk, Pasadena, Perth Amboy, Philadelphia, Pittsburgh, Pittsfield, Portland, Portsmouth, Salem, Salt Lake City, San Antonio, San José, Savannah, Seattle, South Bend, St. Joseph, Syracuse, Tacoma, Toledo, Trenton, Waterloo.

[3] The following are cities which reported buildings in addition to curbstone markets: Akron, Baltimore, Buffalo, Cedar Rapids, Chattanooga, Cincinnati, Cleveland, Columbus, Danville, Dayton, Des Moines, Detroit, Grand Rapids, Great Falls, Houston, Jamestown, Kansas City, Knoxville, Lancaster, Lansing, Marquette, Memphis, Milwaukee, New Castle, New Orleans, New York City, Norfolk, Philadelphia, Pittsburgh, San Antonio, Savannah, Seattle, St. Joseph, Toledo, Youngstown.

such as those in Boston, where the total value of the buildings used for marketing purposes is $2,781,200; Detroit, $92,000; Kansas City, $500,000; Savannah, $275,000. Central retail markets rank next in number,[1] while sixteen distinctly wholesale markets were reported, located in general in the larger cities of the country, such as Baltimore, Cleveland, Dayton, Denver, Detroit, and New York City.[2] The committee found that very few additions have been made to the list of wholesale markets within recent years, but that the tendency is in the direction of extending retail market facilities, as is shown by development in such cities as Baltimore, New Orleans, and Cincinnati.[3]

On the whole, market facilities in the various cities are being well utilized as is shown by the fact that nineteen of the cities from which information was obtained by the committee report that all of the stalls in their markets are rented; sixteen state that from seventy-five to ninety per cent of the space is rented; eight from fifty to seventy-five per cent, and only five less than fifty per cent.[4] As to the types of dealers who occupy municipal markets, the data which have been collected show that cities have busied themselves recently in extending facilities to farmers. Twelve cities report that all who sell produce in the markets are farmers, while in the other cities farmers constitute from five to ninety per cent of the market occupiers except in a few cities such as Boston, Kansas City, Memphis, New Orleans, and Norfolk, where there are no farmers among those who make use of the markets. In New York City there are "no farmers occupying stalls in the public markets other than farmers who occupy space in the farmers' open squares."[5] In general it can be said that in only half of the cities with public markets do farmers occupy a majority of the stalls, and

[1] The following cities reported central retail markets: Akron, Baltimore, Buffalo, Canton, Chattanooga, Cleveland, Columbus, Dayton, Detroit, Duluth, Eau Claire, Fresno, Houston, Ironton, Jamestown, Knoxville, Lancaster, Lansing, Memphis, Mobile, New Albany, Norfolk, Portland, Portsmouth, Salt Lake City, San Antonio, San José, Seattle, South Bend, St. Joseph, Toledo, Washington, Waterloo.

[2] Other cities reporting distinctly wholesale markets are the following: Albany, Fort Wayne, Niagara Falls, Portsmouth, Salt Lake City, San Antonio, San José, St. Joseph, Toledo, and Trenton.

[3] National Municipal League, "Public Markets in the United States, 1917." *Report of a Committee of the National Municipal League*, 8.

[4] *Ibid.*, 15–16.

[5] *Ibid.*, 17–18.

that most of the stall renters are professional retailers or wholesalers. The percentage of professional retailers, wholesalers, and jobbers tends to increase with the size of the city, as is shown by the statistics for such cities as Boston, New York, Kansas City, Baltimore, and New Orleans, where from eighty to one hundred per cent belong to this class of dealers.[1]

In regard to prices, two of the cities — Huntington and Savannah — report that prices charged for produce in the municipal markets are higher than those charged by other dealers; four cities — Danville, Detroit, Joplin, and St. Louis — report that prices are the same, while information from the remainder shows a decrease in prices varying from a slight reduction to as much as one-half. Thus New York, Philadelphia, Norfolk, and Albany report that retail prices at the municipal market are on an average ten per cent less than those elsewhere; in Buffalo, fourteen per cent less; Baltimore, Chattanooga, and Lansing, twenty per cent; Columbus, twenty-five per cent; Jamestown, New York, and Perth Amboy, New Jersey, thirty per cent; Portland and Seattle, fifty per cent; and Fresno, California, fifty to one hundred per cent.[2]

Most of the cities with public markets report a net profit varying from less than a hundred dollars in one city to $77,690.40 in Pittsburgh.[3] Nine cities, however, report net annual losses varying from $460 in Hamilton, Ohio, to $175,658 in New York.[4]

Municipal Ice Plants.

In the last few years there has been considerable agitation in favor of municipal ice plants on the ground that a cheap and pure supply of this commodity is essential to the public health. In 1913 the Legislatures of Wisconsin and Minnesota

[1] National Municipal League, "Public Markets in the United States, 1917." *Report of a Committee of the National Municipal League*, 18–20.

[2] *Ibid.*, 25–26.

[3] The annual net profits reported by various cities are as follows: Auburn, $4,000; Canton, $1,380; Cincinnati, $12,000; Cleveland, $19,261; Columbia, $1,105; Columbus, $18,569; Dayton, $21,050; Denver, $13,000; Detroit, $4,108.15; Dubuque, $281; Fort Wayne, $700; Grand Rapids, $4,289; Houston, $30,000; Huntington, $62; Kansas City, $40,000; Knoxville, $5,255; Lancaster, $1,500; Memphis, $3,000; Milwaukee, $2,262; New Albany, $1,100; New Orleans, $44,961; Norfolk, $15,592; Pasadena, $25; Perth Amboy, $1,448; Philadelphia, $14,632; Pittsburgh, $77,690.40; Portland, $3,000; San Antonio, $6,000; San José, $290; Seattle, $2,521; Syracuse, $38,753; Wheeling, $2,612.

[4] The cities reporting net annual losses are as follows: Akron, $8,968.26; Baltimore, $18,495; Duluth, $200; Hamilton, $460; Little Rock, $8,000; New York, $175,658; St. Louis, $40,000; Toledo, $1,391; Youngstown, $2,853.

authorized cities to operate ice plants,[1] while the cities of Hartford, New Britain, New Haven, South Norwalk, and Willimantic, Connecticut, also have a similar power.[2] So far as can be determined, New Britain, Connecticut, and Weatherford, Oklahoma, are the only two cities which have actually established municipal ice plants. The power of cities to engage in such an enterprise has been questioned in some States. In New York, for example, the court enjoined the mayor of Schenectady from using the city's money for building or operating a municipal ice plant in connection with the waterworks, on the ground that the supply of ice and the supply of water were not related.[3] In Georgia, on the other hand, the Supreme Court has declared that the manufacture of ice is one of the legitimate functions of municipalities.[4]

Miscellaneous.

Although water supplies, lighting plants, and markets are the most important fields of municipal ownership, several cities have municipalized certain exceptional services. At least three cities — Newton, Massachusetts, Bloomington, Indiana, and Sabetha, Kansas — own and operate heating plants;[5] while Northampton, Massachusetts, Dayton, Ohio, and several other cities own municipal theatres. Other exceptional instances are an omnibus line which is owned by the city of New York, the ownership of a canal in Augusta, Georgia, a powder magazine in Charleston, South Carolina, and a municipal forest in Toledo, Ohio.[6]

IV. Municipal Ownership in Massachusetts.

Legislation Relating to Municipal Ownership.

Waterworks and Lighting Plants. — The Constitution of Massachusetts does not contain any provisions in regard to municipal ownership and this matter has been regulated en-

[1] *Laws of Wisconsin, 1913*, Chap. 289; *Laws of Minnesota, 1913*, Chap. 305.

[2] Wentworth, J. W., *A Report on Municipal and Government Ice Plants in the United States and Other Countries*. Submitted for the information of the President of the Borough of Manhattan, City of New York, December 15, 1913 (New York, 1913), 32–39.

[3] *Ibid.*, 66–67.

[4] Holton *v.* Camilla (1910), 134 Ga. 560, 68, S. E. 472.

[5] *National Municipal Review*, III, 384 (1914).

[6] U. S. Bureau of the Census, *Financial Statistics of Cities, 1915*, 79, 99.

tirely by statute. Cities and towns obtain authority to purchase, construct, and operate waterworks by special acts of the Legislature, while municipal ownership of lighting plants and public markets is provided for by general laws.

According to an act of 1891 (*Acts and Resolves of Massachusetts, 1891*, Chap. 370, Sec. 1) as subsequently amended, any city or town in the Commonwealth may, upon approval of a majority of the voters, "construct, purchase or lease and maintain within its limits one or more plants for the manufacture of gas or electricity for municipal use or for the use of its inhabitants, except for the operation of electric cars."[1] Upon authorization from the State Board of Gas and Electric Light Commissioners, a city or town may also extend its mains or lines into an adjoining city or town for the purpose of distributing gas and electricity, provided that such other city or town is not otherwise supplied with these services.[2]

In case there is a private lighting plant already in operation at the time municipal ownership is adopted by any city or town, it is made the duty of the municipality to purchase so much of the existing plant and equipment as are within its limits. If the city or town and the owners of the plant cannot agree as to the price which should be paid by the municipality, either party may apply to the Supreme Judicial Court for the county in order to determine the value of the property. The Court is then authorized to submit the controversy to the Board of Gas and Electric Light Commissioners which investigates the matter and determines the price of the plant which, when approved by the Court, is made final.[3]

Municipal lighting plants in Massachusetts as well as private plants are under the supervision of a central State board — the Board of Gas and Electric Light Commissioners. The rates that cities and towns may charge for lighting shall not be greater in amount than will allow a net profit of eight per cent upon the total investment, and all schedules of rates are required to be certified to the Board of Gas and Electric Light Commissioners.[4] A city or town which undertakes the owner-

[1] Consolidated laws relative to the manufacture, distribution, and sale of gas and electricity, *Acts and Resolves of Massachusetts, 1914*, Chap. 742, Sec. 92.

[2] *General Acts of Massachusetts, 1915*, Chap. 191, Sec. 1.

[3] *Acts and Resolves of Massachusetts, 1914*, Chap. 742, Secs. 100–101.

[4] *Ibid.*, Secs. 115–116.

ship of a gas or electric lighting system is also required to keep its books, accounts, and records in such form as may be prescribed by the State Board, and to make such reports as the Board may demand.[1] In this way uniformity of accounts and of financial administration is obtained throughout the various cities and towns which have undertaken the ownership of their lighting systems.

Exemption of Water and Lighting Bonds from Debt Limit. — Massachusetts has followed the practice of a number of other States in exempting public utility loans from the debt limit fixed by the Legislature. The Municipal Finance Act of 1913 provides in this connection that cities and towns may incur indebtedness outside of the debt limit for (1) "establishing, or purchasing a system for supplying the inhabitants of a city or town with water, or for the purchase of land for the protection of a water system, or for acquiring water rights;" (2) "for the extension of water mains and for water departmental equipment;" and (3) "for establishing, purchasing, extending or enlarging a gas or electric lighting plant within the limits of a city or town," provided that the indebtedness incurred for such lighting plant "shall be limited to an amount not exceeding in a town five per cent and in a city two and one-half per cent of the last preceding assessed valuation of such town or city." [2]

The theory upon which public utility loans are exempted from the debt limit is that the interest and principal of such obligations can be paid out of the income derived from the plant, thus making it unnecessary to draw upon the general tax fund. Also the large initial expenditure involved in taking over or constructing a lighting or water system would make it practically impossible for the average city to undertake municipal ownership without an exemption of this nature.

Public Markets. — The Legislature has also by an act passed in 1915 and amended in 1916 authorized cities and towns to construct and operate public markets. In the exercise of this power, however, municipalities are subject to the control of the State Board of Agriculture, since they must obtain the approval of this Board in order to acquire land for market purposes,

[1] *Acts and Resolves of Massachusetts, 1914*, Chap. 742, Sec. 120.
[2] *Ibid., 1913*, Chap. 719, Sec. 6.

while all rules and regulations governing the use of such markets are required to have the consent of the Secretary of the Board.

The most important provisions of the act authorizing the municipal ownership of markets are as follows: —

> All cities and all towns having a population of ten thousand or more are hereby authorized to provide and maintain public markets with suitable buildings and grounds. For this purpose any such city or town may, with the approval of the State Board of Agriculture, take or acquire land by purchase or otherwise, with or without buildings, and may make alterations in buildings and construct new buildings on land so acquired.[1]
>
> Any city or town which maintains a public market or market place in accordance with the provisions of this act may make rules and regulations for the use and management thereof, subject to the approval of the Secretary of the State Board of Agriculture, and may attach penalties for their violation.[2]

Extent of Municipal Ownership in Massachusetts.

Water Supplies. — The cities and towns of Massachusetts undertook the ownership and operation of their water supplies at an early date. Among the large places, Worcester established a municipal water plant in 1845, while Boston took a similar step in 1848. The movement toward municipalization has continued until at the present time twenty-five of the thirty-five cities of the Commonwealth own and operate independent water systems, while the remaining ten cities — Boston, Chelsea, Everett, Malden, Medford, Melrose, Newton, Quincy, Revere, and Somerville — are included in the Metropolitan Water District, which may be regarded as a plan of co-operative municipal ownership. The Metropolitan Water District, which was created by the Legislature in 1895 for the purpose of supplying Boston and the surrounding municipalities with water, is in charge of a Board of three members (Metropolitan Water and Sewerage Board) appointed by the Governor, and the expenses of the system are apportioned among the various cities and towns within the District. Each of the cities and towns maintains its own distributing system and merely purchases the water which it needs from the Metropolitan District.[3] Thus it is seen that all of the thirty-five

[1] *General Acts of Massachusetts, 1915*, Chap. 119, Sec. 1.

[2] *Ibid., 1916*, Chap. 79.

[3] *Acts and Resolves of Massachusetts, 1895*, Chap. 488; 1901, Chap. 168.

cities of the Commonwealth have publicly owned water supplies either independently or as parts of the Metropolitan system.

Of the seventy towns with a population of over 5,000, all but twelve are supplied with publicly owned water systems.[1] In most of the towns with public water supplies the system is owned by the town itself. In a few, however, such as Greenfield, Middleborough, and Montague, separate municipal corporations designated as water supply or fire districts have been established in order to construct and own the works. This plan is followed in towns where there is a scattered rural population in a part of the community, thus making it difficult for the inhabitants in the more thickly settled portion to obtain a water supply through a vote of the town.[2]

From the above description it is seen that municipal ownership of waterworks is the common rule among the cities and towns of Massachusetts while private ownership is the exception. The tendency toward municipal ownership of waterworks is indicated by the following table, which shows that the percentage of the total population supplied with water by private companies has decreased from sixteen and one-half per cent in 1890 to five per cent in 1915.[3]

Year.	Total Population of All Cities and Towns provided with Water Supplies (Public and Private).	Population of Cities and Towns supplied by Private Companies alone.	Per Cent of Total Population supplied by Private Companies.
1890,	1,924,812	318,319	16.5
1895,	2,237,017	212,579	9.5
1900,	2,565,301	236,869	9.2
1905,	2,792,490	193,290	6.9
1910,	3,171,055	159,730	5.0
1915,	3,528,769	174,760	5.0

[1] The twelve towns of over 5,000 population which are still supplied by private water systems are as follows: Amherst (5,558), Bridgewater (9,381), Dedham (11,043), Fairhaven (6,277), Grafton (6,250), Hingham (5,264), Ludlow (6,251), Milford (13,684), Millbury (5,293), Northbridge (9,254), Palmer (9,468), and Southbridge (14,217).

[2] *First Annual Report of the State Department of Health of Massachusetts, 1915* (Boston, 1916), 42–44, 293–309.

[3] *Ibid.*, 295.

It is difficult to draw any definite conclusions as to the results of municipal ownership of waterworks in Massachusetts cities and towns because of the various factors that must be considered in each individual case. The following table, compiled from the reports of the United States Bureau of the Census for 1915, indicates some of the financial results that have been obtained in the larger cities which own and operate separate municipal plants:[1]

City.	Value of System.	Income.	Operating Expenses.[2]
Brockton,	$2,254,000	$148,992	$63,992
Fall River,	3,089,900	237,351	122,560
Fitchburg,	1,247,316	96,202	50,895
Haverhill,	1,503,965	135,878	41,614
Holyoke,	1,393,786	137,542	73,157
Lawrence,	1,553,281	152,141	61,735
Lowell,	2,029,377	222,812	154,070
Lynn,	3,700,000	339,689	159,253
New Bedford,	3,072,185	325,095	99,190
Pittsfield,	2,220,000	127,145	16,864
Salem,	2,015,400	103,492	130,882
Springfield,	5,314,446	520,362	262,372
Taunton,	1,510,836	105,003	43,013
Worcester,	6,551,673	481,324	90,510

Public Lighting. — In the field of public lighting the development of municipal ownership has not been so extensive as in the case of water supplies. At the present time only four of the thirty-five cities of the Commonwealth — Holyoke, Chicopee, Peabody, and Taunton — own and operate their lighting systems. In Holyoke the city owns and operates both the electric light and gas plants, in the other cities only the electric plant. In Peabody the municipality does not provide for the generation of electricity, but merely purchases the current from a private company and distributes it to consumers. In the cities of Holyoke, Chicopee, and Taunton, on the other hand, the city produces as well as distributes the current.[3]

Public ownership of lighting systems is somewhat more common in the towns of the Commonwealth than in the cities.

[1] U. S. Bureau of the Census, *General Statistics of Cities, 1915*, Table 12, pp. 144–145; also *Financial Statistics of Cities, 1915*, Table 11, pp. 185–187, and Table 15, pp. 215–217.

[2] Includes operating expenses alone; does not include payments for interest, depreciation, etc.

[3] *Thirty-second Annual Report of the Massachusetts Board of Gas and Electric Light Commissioners*, 236–239.

Seventeen of the seventy towns of over 5,000 population are engaged in the supply of electricity, including Belmont, Braintree, Concord, Danvers, Hingham, Hudson, Ipswich, Mansfield, Marblehead, Middleborough, North Attleborough, Norwood, Reading, South Hadley, Wakefield, Westfield, and Wellesley.[1] In six of the towns above mentioned current is purchased from private companies or from other municipalities and the town provides only for its distribution. There appears to be a tendency for such an arrangement to become more widespread on the ground that it is more economical for a small community to buy current from a central supply company than to maintain an independent generating plant.

Only three of the twenty-one cities and larger towns with municipal lighting plants reported a loss in operation as defined by statute during 1915, namely, North Attleborough, Westfield, and Wakefield. The other municipalities reported during the same year an excess of income and appropriations over expenditures (expenditures include payments for operation, maintenance, repair, interest, and depreciation) varying from $338 in Ipswich to $8,241 in Norwood.[2]

Markets. — A number of cities and towns have also established public markets, including Boston, Attleboro, Brookline, Brockton, Cambridge, Duxbury, Framingham, Greenfield, Holyoke, Lowell, Medford, Medfield, Peabody, Pittsfield, Quincy, Salem, Springfield, Stockbridge, Taunton, Walpole, and Weymouth.[3] In most of these places the market is of the curbstone or open-market type, but in Boston the equipment includes extensive buildings in the heart of the business district. The value of the property devoted to markets as reported by the United States Bureau of the Census varies from $400 in Quincy to $2,781,000 in Boston. The total amount of money invested in municipal markets in Boston is greater than in any of the other cities of the country except New York.[4]

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[1] *Thirty-second Annual Report of the Massachusetts Board of Gas and Electric Light Commissioners*, 236–239.

[2] *Ibid.*, 191–235.

[3] This list of cities with public markets was obtained from the Massachusetts Committee on Public Safety, August 15, 1917.

[4] Statistics in regard to markets compiled from U. S. Bureau of the Census, *Financial Statistics of Cities, 1915*, Table 27, pp. 290–295, and from report of a committee of the National Municipal League on *Public Markets in the United States* (Philadelphia, 1917).

Street Railways. — The municipal ownership of street railways has been undertaken in Massachusetts to only a very slight extent. The city of Boston, however, owns the subway structures under its streets, which have been leased to a private company for a term of years for equipment and operation. The construction of the subway and its administration, so far as the city is concerned, are in the hands of the Rapid Transit Commission of five members, two of whom are appointed by the Governor and three by the mayor.

Another example of municipal ownership is found in the city of Holyoke. Prior to 1869, that city was served by the Connecticut River Railroad Company, running north from Springfield, through the Connecticut Valley and connecting at Greenfield with other railroads. Beginning at Northampton, the New Haven & Northampton Railroad ran from Northampton to Westfield to New Haven. The Boston & Albany Railroad extended from Boston to Albany, running through Westfield. The management of the Connecticut River Railroad Company adopted what the shippers of Holyoke deemed to be a somewhat arbitrary and unjust attitude, and the manufacturers and citizens of the city determined to build a railroad extending from Holyoke to Westfield and thus connect with the New Haven & Northampton system and the Boston & Albany Railroad. By chapter 379 of the Acts of 1869, the railroad was incorporated, with a capital stock fixed at not less than $200,000, and not more than $350,000, and the town of Holyoke was authorized to subscribe for stock to an amount not exceeding 3 per cent of the assessed valuation of the town. The town was authorized to choose an agent or agents to represent the town at the meetings of the railroad corporation, and vote on the stock owned by the town. Stock was issued in the amount of $260,000, composed of 2,600 shares, the par value of which was $100 each, of which number 2,265 shares were purchased and are owned by the city, the remaining shares being purchased by corporations and citizens of the city.

The road was built in 1869 and 1870, at a cost of $260,000, plus a bond issue of $200,000, plus an additional bond issue for improvements in the amount of $60,000, which last issue was later paid out of the earnings. The road thus cost

$520,000, and, in addition, a large amount of land on which terminal facilities were built was sold or donated at a very low figure, so that there has been a considerable appreciation of the value of the land.

In 1870 the road was leased to the New Haven & Northampton Company at an annual rental of one-half the gross receipts of the road, ascertained in a manner set forth in the lease.

Later, the New Haven & Northampton Company was purchased by the New York, New Haven & Hartford Railroad Company.

In the year 1907 the terms of the lease were revised by contract entered into between the Holyoke & Westfield Railroad Company and the New Haven & Northampton Company and agreed to by the New York, New Haven & Hartford Railroad Company, by which the New Haven & Northampton Company agreed to pay a gross annual rental of $46,000, to assume all charges for upkeep and repairs, and pay all taxes and other charges. The sole expense devolving upon the Holyoke & Westfield Railroad Company was the payment of interest on its bond issue of $200,000 and small organization expenses. This amended lease was ratified by a special act of the Legislature by chapter 596, Acts of 1908. Under the terms of this lease the stockholders of the Holyoke & Westfield Railroad receive an annual net income amounting to a dividend of about 14½ per cent on the stock, and the city of Holyoke, owning 2,265 shares, receives in dividends the sum of $31,710 per year.

V. Constitutional Provisions relating to Municipal Ownership.

The Constitutions of only eight States — South Carolina, Virginia, Oklahoma, Arizona, Colorado, California, Ohio, and Michigan — expressly grant to cities the power to own and operate public utilities. In the other States this matter is regulated entirely by statute. Following is an analysis of the constitutional provisions of the above-mentioned States from the standpoint of: (1) the extent of the power granted; (2) limitations upon the exercise of the power; and (3) special financial provisions in regard to public utility debts.

South Carolina.

The constitutional grant of the power of municipal ownership in South Carolina applies to all cities and towns and includes the right to acquire, construct, and operate, but is somewhat narrow because it extends only to waterworks and lighting plants. In order to exercise the power of municipal ownership in either of these fields the municipality must obtain the approval of a majority of the electors qualified to vote on the bonded indebtedness of the city.[1] In certain specified cities debts incurred for lighting plants and water supplies are not to be included in computing the maximum amount of indebtedness that may be incurred by the city in question.[2]

Virginia.

The Constitution of Virginia opens the way for municipal ownership by giving a city or town the right to include a provision in any franchise reserving to the municipality the power to acquire the property and equipment of the company to which the franchise is granted. When once the city has obtained possession of a public utility in this manner, it may sell or lease the same at will, but cannot operate the plant without obtaining the consent of the State Legislature. Under the Virginia Constitution, therefore, cities are not given express power to construct public utilities but merely to take over the plants of companies already in the field. Debts incurred for municipal ownership are exempted from the local debt limit provided that the plant in question is in a position to pay its own expenses of operation and administration.[3]

Oklahoma and Arizona.

The Constitutions of Oklahoma[4] and Arizona[5] do not state definitely what public utilities may be owned and operated by cities, but merely grant to municipalities the general power to

[1] *Constitution of South Carolina*, Article VIII, Sec. 5.
[2] *Ibid.*, Sec. 7.
[3] *Constitution of Virginia*, Article VIII, Secs. 125, 127.
[4] *Constitution of Oklahoma*, Article XVIII, Sec. 6.
[5] *Constitution of Arizona*, Article XIII, Sec. 5. For text of the Oklahoma provision, see Appendix, *post*, 31.

"engage in any business or enterprise" which could be engaged in by a private corporation by virtue of a franchise from the city. In both Constitutions the power is granted to all the cities and towns and extends to acquisition, construction, and operation by the city, since all these matters would be included in the powers of a private corporation engaging in the enterprise.[1] Both Constitutions provide that a city may go beyond its constitutional debt limit for purposes of municipal ownership provided that the approval of a majority of the property — tax-paying voters — is obtained and with the further limitation in Arizona that such additional indebtedness shall not exceed five per cent of the assessed valuation of property within the city.[2]

Colorado.

The municipal ownership provision of the Colorado Constitution applies to the consolidated city and county of Denver and to all other cities of over 2,000 population which have adopted home rule charters. The grant of power is very broad, since it gives to any of the above-mentioned cities authority to construct, purchase, or acquire and operate "water-works, light plants, power plants, transportation systems, heating plants and any other public utilities or works or ways local in use or extent," whether within or without the territorial limits of the city, and everything required therefor, for the use of the city and its inhabitants. This section grants to cities the power of municipalizing not only the ordinary public utilities but also any public utility which is for the use of the city and its inhabitants. The Constitution does not place any of the usual restrictions upon the exercise of the power, such as the requirement of a popular referendum or the approval of any higher authority. Cities may issue bonds in any amount for the purpose of acquiring, constructing, or operating such public utilities as may be provided for in their charters.[3]

[1] Statutes in both States have interpreted this power to include the power to acquire land inside or outside the corporate limits, and to establish thereon waterworks, electric light and gas plants, hospitals, quarantine stations, garbage reduction plants, and pipe lines for gas, water, and sewerage.

[2] *Constitution of Oklahoma*, Article X, Sec. 27; *Constitution of Arizona*, Article IX, Sec. 8.

[3] *Constitution of Colorado*, Article XX, Secs. 1, 6.

California.

The Constitution of California, by an amendment adopted in 1911, grants to all municipal corporations of the State the power to establish and operate public works for supplying their inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication. Cities may acquire public utilities by construction or by the purchase of existing plants. A municipality may furnish services outside its limits but cannot provide these services in any city which already owns and operates a similar utility unless it first obtains the consent of such other city.[1]

Ohio.

Under the Constitution of Ohio any municipality may "acquire, construct, own, lease and operate within or without its corporate limits any public utility." There is no attempt to define expressly what is included under the term "public utility," except that it must be some "public utility the product or service of which is or is to be supplied to the municipality or its inhabitants."[2] A city may acquire a public utility by condemnation or open purchase in the market. As in Colorado and California, the plant may be located either within or without the city limits. Moreover, a municipality owning or operating a public utility for its own benefit may "sell and deliver to others any transportation service of such utility and the surplus product of any other utility;" but the amount which may be supplied outside of the city in either case may not exceed fifty per cent of the total service of that utility within the municipality.[3]

The chief limitation upon the exercise of the power of municipal ownership under the Constitution of Ohio is that cities must provide for the ownership of a public utility by ordinance and that such ordinance shall not go into effect until after thirty days from its passage. If a petition signed by at least ten per cent of the electors is presented within this period requesting a referendum, a vote must be taken at a general or

[1] *Constitution of California*, Article XI, Sec. 19. See Appendix, *post*, 31.
[2] *Constitution of Ohio*, Article XVIII, Sec. 4. See Appendix, *post*, 30.
[3] *Ibid.*, Sec. 6.

special election on the question of taking over the utility in question.[1] Cities which purchase or construct public utilities may issue mortgage bonds for such purpose beyond the general debt limit fixed by law, but these bonds are to be a lien only upon the property and revenue of such public utility and are not to impose any liability upon the municipality.[2]

A special feature of the Constitution of Ohio is a provision authorizing the Legislature to provide for the examination of the vouchers, books, and accounts of public undertakings conducted by municipal authorities.[3]

Michigan.

The provisions of the Constitution of Michigan present the same general features as those of Colorado, California, and Ohio, with some variations in detail. The public utilities that cities may take over and operate are definitely enumerated and include the supply of water, light, heat, power, and transportation, with the exception that the ownership of transportation facilities may be undertaken only in cities having more than 25,000 inhabitants. The plants may be located either within or without the city limits. The city may sell and deliver water, light, heat, and power without its corporate limits to an amount not exceeding twenty-five per cent of that furnished within the city limits. Transportation facilities, on the other hand, may be provided by a city outside its limits only to the extent prescribed by law.[4]

In order to acquire a public utility the city must first obtain the affirmative vote of three-fifths of the electors. Women taxpayers having the other necessary qualifications are entitled to vote on questions of municipal ownership as well as male voters.[5]

Cities in Michigan, like those in Ohio, are given the power to issue mortgage bonds beyond the debt limit for the purpose of acquiring or constructing a public utility plant with the limitation that such bonds shall not be an obligation against the municipality but shall be secured by the revenue and property of the plant.[6]

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[1] *Constitution of Ohio*, Article XVIII, Sec. 5. See Appendix, *post*, 30.
[2] *Ibid.*, Sec. 12.
[3] *Ibid.*, Sec. 13.
[4] *Constitution of Michigan*, Article VIII, Sec. 23.
[5] *Ibid.*, Sec. 25.
[6] *Ibid.*, Sec. 24.

Summary of Constitutional Provisions.

A summary of the above constitutional provisions shows that each of the eight States except Colorado grants the power of municipal ownership to all of its cities. In Colorado the provision applies only to those cities of more than 2,000 inhabitants that have adopted home rule charters. There is considerable variation as to what public utilities a city may own and operate. In South Carolina the constitutional grant of power extends only to water and lighting plants. In California, Colorado, and Michigan the right is somewhat broader and extends to such utilities as transportation, heating, power, and telephone services, as well as to water and lighting plants. Under the Constitutions of Arizona and Oklahoma, cities may engage in any business or enterprise which may be undertaken by a private individual or corporation by virtue of a franchise, while in Ohio the power of municipal ownership extends to all public utilities without enumeration.

The most common limitation upon municipal ownership is that the question of acquiring or constructing a public utility must be referred to the voters of the city for their approval or rejection. Such provisions are found in the Constitutions of Ohio, South Carolina, and Michigan. In Ohio the proposition is referred to the voters only when a referendum is demanded by a certain percentage of the voters. In South Carolina and Michigan, on the other hand, all proposals for municipal ownership must be referred to the voters. In South Carolina the vote required is a majority of the electors qualified to vote on bond issues. In Michigan it is a three-fifths majority of all electors.

In all of the Constitutions except that of California, provision is made for exempting public utility bonds from the general debt limit. It should also be said that in a number of the other State constitutions which do not contain special sections in regard to municipal ownership, provision is made that debts incurred for the purchase or construction of public utilities shall not be included in computing the maximum amount of indebtedness of any city. Among these States are Arkansas, New Mexico, New York, and Pennsylvania.

Appendix.

Typical Constitutional Provisions relating to Municipal Ownership.

Ohio.

Article XVIII, Sec. 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Sec. 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

Sec. 6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality.

Sec. 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

California.

ARTICLE XI, SEC. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; *provided*, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance.

Oklahoma.

ARTICLE XVIII, SEC. 6. Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said corporation.

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BULLETIN No. 23

ABSENT VOTING

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ABSENT VOTING.

I. Absent Voting in New England.

Absent voting, or voting by proxy, is not a novel feature in American law. As early as 1635 it was provided in the Colony of Massachusetts Bay that certain towns whose safety would be endangered if all their electors should go to Boston to attend the General Court might detain such as they deemed necessary, and such electors were to be permitted to send their votes by proxy. In 1636 this provision, which was apparently designed to meet a temporary emergency, was embodied in a permanent statute in these words:

> This Courte, takeing into serious consideration the greate danger & damage that may accrue to the state by all the freemens leaveing their plantations to come to the place of elections, have therefore ordered it, that it shalbee free & lawfull for all freemen to send their votes for elections by proxie the next Generall Courte in May, & so for hereafter, wch shalbee done in this manner: The deputies wch shalbee chosen shall cause the freemen of their townes to bee assembled, & then to take such freemens votes as please to send by proxie for every magistrate, & seale them vp, severally subscribing the magistrates name on the backside, & soe to bring them to the Courte sealed, wth an open roule of the names of the freemen that so send by proxie.[1]

A law enacted in 1663 shows that the personal presence of the voter was not required even at the town meetings at which the proxies were collected. This act contained this provision:

> The constable of each toune shall, some convenjent tjme before the day of election, giue due notice to all the freemen of that toune to meete together to giue their votes for elections, and that none shall be admitted to giue votes for any other, *vnlesse the person voteing be also present, or send his vote, sealed vp, in a note directed to the deputy or tounesmen mett together for that worke.*[2]

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[1] *Records of Massachusetts*, I, 188. It should be understood that the term "proxy" as used in these acts meant merely that the voter's ballot might be transmitted by messenger, and not that the absentee could authorize another person to vote for him according to his own discretion.

[2] *Records of Massachusetts*, IV, Pt. 2, 86.

The charter of William and Mary, granted in 1691, required that the Governor and Council and representatives should be elected "by the major part of the freeholders and other inhabitants of the respective towns or places, who shall be present at such elections." This restrictive clause put an end to voting by proxy.

The Civil War brought the subject again into view because of the necessary absence at the front of so many thousands of voters. Many States were so much impressed by the injustice of disfranchising men whose absence was entirely due to the fact that they were engaged in the public service that provision was made whereby soldiers in the field could vote. Whether or not such legislation was valid depended upon the provisions of the constitution of the State concerned.[1]

The constitutions of the three New England States, Connecticut, Massachusetts and Vermont, in each of which the laws providing for absent voting were held to be invalid, are alike, in that they speak of elections as being held in "meetings" (Massachusetts), "meetings of the electors" (Connecticut), or "freemen's meeting" (Vermont). Even as late as 1885, an amendment to the Constitution of Massachusetts refers to a "public meeting" for the election of officers. These terms seem to imply the personal presence of the voter at an assembly called for the purpose of electing officers. It was upon this ground that the Judges of the Supreme Court of Connecticut held the absent-voting law of that State to be unconstitutional. The court said:

> The convention found the "freemen's meeting" a distinct and peculiar feature in the political system of the State, as old as its history. It originated in 1639, in the compact or Constitution formed by the towns of Hartford, Windsor and Wethersfield, in a provision for the warning of a "freemen's meeting" to elect deputies (representatives) from each town to the General Court (Assembly). From that year, and after the merger of the New Haven colony under the charter of Charles, there has never been an election, by the people, of representatives or state officers, in any other manner or place. The convention adopted this

[1] Such legislation was sustained in Bourland *v.* Hildreth, 26 Cal. 161, and Lehman *v.* McBride, 15 Ohio State, 573. It was declared unconstitutional in Opinion of the Judges, 30 Conn. 591; Opinion of the Justices, 37 Vt. 665; Opinion of the Justices, 44 N. H. 633; Morrison *v.* Springer, 15 Iowa, 304; Twichell *v.* Blodgett, 13 Mich. 127; Chase *v.* Miller, 41 Pa. St. 403; State *ex rel.* Chandler *v.* Main, 16 Wis. 422.

feature, as they did in the main the other institutions of the state, changing its name to "electors' meeting." And then, in pursuance of one of their leading purposes, they directed, in as clear and explicit language as they could command, and specifically, and with repetition as to each of the officers, that they should be successively voted for and chosen "at," or "in," that electors' meeting. *There* the Constitution directs that the votes of the electors shall be offered and received; that is the only place contemplated or in any way alluded to in that instrument where they may be offered and received; and there only, we are satisfied, they must be offered and received, or they can have no constitutional operation in the election for which they are cast.[1]

The Constitution of Massachusetts as it now stands provides that the members of the House of Representatives "shall be chosen by written votes," but that the Senators are to be chosen at a "meeting" and that "the selectmen of the several towns shall preside at such meetings impartially; and shall receive the votes of all the inhabitants of such towns present and qualified to vote for Senators." The Governor and all other State officers elected under the Constitution are to be elected at a "meeting" where the voters shall "give in their votes for a Governor, to the selectmen, who shall preside at such meetings."

The language of the Constitution is explicit as to the election of Senators by voters who are "present," and the provision for the election of the Governor and other State officers seems also to imply the presence of the voter. It seems probable, therefore, that the General Court is not authorized to enact a general law providing for absent voting.[2] This was apparently the view taken by the Legislature of 1916, which made provision whereby the Massachusetts troops on the Mexican border could vote for Presidential electors, United States Senators and members of the Federal House of Representatives, but not for any State officers.[3]

II. The Extent of the Problem.

It has been seen that absent voting was first introduced into the laws of Massachusetts in order to allow electors living in towns exposed to Indian attacks to remain at home and protect

[1] Opinion of the Judges, 30 Conn. 591.

[2] Since this statement was prepared, a constitutional amendment conferring upon the General Court full power to deal with the subject of absent voting has been adopted. It is printed in the Appendix.

[3] *General Acts, 1916*, chap. 312. A similar law was enacted in Vermont. See *Laws of Vermont, 1915*.

their families. This condition soon passed away and when the system was again resorted to it was for the purpose of enabling voters who were absent on military service still to exercise their rights as electors. In fact most of the laws dealing with the subject have been for the benefit of the soldiers and sailors. There are other classes of voters, however, whose ordinary business may involve absence from home on election day, and who in ordinary times are more numerous than the voters in the army and navy. Among these may be mentioned commercial travelers, railway conductors and trainmen, locomotive engineers and firemen, artisans of various kinds, chauffeurs, sailors, fishermen and students. In a speech in the Federal House of Representatives, January 23, 1915, Hon. John Jacob Rogers of Massachusetts estimated that at least twenty thousand men in Massachusetts are necessarily absent from home on election day and thereby lose their votes. The present writer thinks that the number is more nearly thirty thousand. The work of some railway men is so arranged that they have not had an opportunity to vote for twenty years. Many others preserve their votes only at a considerable sacrifice of time and money. For instance a locomotive engineer informed the present writer that it cost him nearly nineteen dollars to be at home at the last election.

Furthermore the proportion of voters who are absent from home on election day is likely to increase from year to year because of the requirements of business. As commerce develops and population increases the number of men employed as commercial travelers or engaged in various branches of transportation will necessarily grow larger. The widespread use of automobiles has created a new calling — that of chauffeur, — and the nature of this work may entail absence from home at any given day. Large engineering or building enterprises such as the construction of a dam or a railway or the erection of a great building may require the temporary presence in considerable numbers of men who do not acquire a voting residence in the place where they happen to be working, and who lose their vote at home because of their absence. At every election the vote cast falls far short of the number of registered voters. This is commonly ascribed to indifference, but if all

the facts could be ascertained it is not improbable that a considerable part of the discrepancy would be found to be due to the necessary absence of voters on election day. It should also be noted that the classes who lose their votes through necessary absence for business reasons are in general well-trained men of high intelligence, whose judgment upon public questions would be of material value to the community. It is these considerations which have influenced a considerable number of States to make provision for preserving to the absent voter his electoral privilege and for securing to the State the benefits accruing to it from his use of his privilege.

III. How the Problem has been met.

As far back as 1857, when Oregon was admitted to the Union as a State, she placed in her Constitution the following provision:

> All qualified electors shall vote in the election precinct in the county where they may reside, for county officers, and in any county in the State for State officers, or in any county of a Congressional District in which such electors may reside, for Members of Congress.[1]

This was the first constitutional provision made in the United States for voting by electors who were away from home on election day. A few years later the Civil War made the question of absent voting an urgent one, and in 1864 Kansas, Maine, Nevada, Pennsylvania and Rhode Island adopted constitutional provisions for the benefit of voters in the military or naval service.[2] The amendment adopted in Maine covered every detail of the process and left little for determination by the Legislature. Constitutional provisions were also adopted in 1874 by New York, in 1875 by Nebraska and New Jersey, in 1889 by South Dakota, in 1896 by Utah, in 1908, 1914 and 1918 by Michigan and in 1917 by Massachusetts. The entrance of the United States into the Great War in 1917 again made the question of absent voting an urgent one, and while but two States (Massachusetts and Michigan) adopted con-

[1] *Constitution of Oregon (1857)*, Art. II, Sec. 17.

[2] Attention should also be called to the ordinance adopted by the Missouri State Convention, June 12, 1862. See Thorpe, *Charters and Constitutions*, IV, 2186.

stitutional provisions on the subject at that time, many States dealt with the matter by statute. As a result, at the present time (1918), every State in the Union except Alabama, California, Georgia, Louisiana and Maryland makes some provision by constitution or by statute for the absent voter.[1]

Provision for absent voting has also been made in the Commonwealth of Australia and in the States of Victoria and West Australia, as well as in New Zealand, Norway and some of the cantons of Switzerland. Since the outbreak of the present war both New Zealand and British Columbia have enacted laws which enable members of their expeditionary forces to exercise their franchise.

IV. Provisions of the Statutes.

The constitutions and statutes dealing with absent voting necessarily deal with two questions of fundamental importance, — what absent voters may vote and where absent voters may vote.

1. *Who may vote.* — The first provision made for the absent voter — that adopted in Oregon in 1857 — applied to all qualified voters, but all the constitutional provisions adopted under the impetus of the Civil War confined the privilege of absent voting to electors who were absent on military service. Michigan was the first State after Oregon to make constitutional provision for any but soldiers and sailors. The amendment adopted in 1914 extended the privilege of absent voting not only to electors in military service, but also to students while in attendance at any institution of learning, to members of the Legislature while attending its sessions and to commercial travelers. In 1918 still other classes were enumerated and the Legislature was further empowered to provide for all qualified electors who may be "necessarily absent." The amendment adopted in Massachusetts in 1917 is as sweeping as the Oregon Constitution of 1857 and enables the Legislature to provide for voting by any qualified voter who is absent from his city or town on election day.

[1] Maryland provided in 1917 for the renewal of the registration of registered voters who are absent in the military or naval service of the United States. *Laws of Maryland, 1917*, ch. 40. California also provides for registration by absent electors. *Statutes, 1917*, ch. 710.

Those States which have dealt with the subject by statute without any express constitutional authorization or where the Legislature has full discretion in the matter, as in Massachusetts, are about equally divided in the view which they take as to the classes of absent voters who should be allowed to vote. In twenty-three States — Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Minnesota, Missouri, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Dakota,[1] Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming — any qualified voter may vote *in absentia*. In sixteen States — Arizona, Connecticut, Delaware, Kansas, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, and West Virginia, — provision is made for absent voting only by persons in military or naval service. In South Carolina, the privilege extends to all persons in the Federal service, whether civil or military.

Several States permit the absent voter to vote only if his absence is due to certain specified reasons. Of the various constitutional provisions only those of Massachusetts and Oregon make no provision as to the cause of the absence. All the others, as already indicated, specify that voters of certain classes may vote when away from home even though their absence is not caused by the duties of their occupation. In the statutes however it is common to find that an absent voter may vote only when "unavoidably" absent (Ohio), or absent "through the nature of his business" (Iowa), or "unavoidably absent because his duties, occupation or business required him to be elsewhere" (Arkansas, Colorado, Florida), or who is absent "by reason of illness or the nature of his business or other unavoidable cause" (Indiana), or "only when required by his regular business or occupation and his habitual duties" (Tennessee and Virginia). Wyoming is even more explicit. In that State the statute says:

> Any elector whose duties are such as to require him to be absent from his regular place of residence at stated or regular intervals who may be absent from his county because of such regular duties or occupation may vote in any county where he may be present.

[1] While the statute in South Dakota provides for all qualified electors, the Constitution of South Dakota provides only for "soldiers in time of war".

In New Mexico and Washington the voter must not only be "unavoidably" absent, but he must be distant from his home at least fifteen and twenty-five miles respectively. On the other hand Idaho, Minnesota, North Carolina and South Dakota provide for voting by all qualified absent electors without regard to the reason for their absence.

2. *Where the Absent Voter may vote.* — In twenty-four States in which absent voting is provided for, the statute either explicitly provides that the ballot may be cast anywhere or by its silence produces the same result. In eleven States — Arkansas, Colorado, Florida, Missouri, New Mexico, Oregon, South Carolina, Texas, Vermont, Washington and Wyoming — the absent voter may vote only within the State. In the case of soldiers and sailors it is obvious that this restriction deprives the privilege of much of its value. In six States — Arizona, Connecticut, Maine, Montana, Nebraska and Nevada — the absent elector may vote only if he is outside the State, while the statute of Minnesota provides that he may vote anywhere in the United States except in Alaska or the island possessions.

V. Criticism of Absent-Voting Laws.

1. Many of the absent voting laws now in force confine the privilege of absent voting to soldiers and sailors. A few, of which the Michigan statute is a good example, enumerate certain other classes to whom the privilege is extended. It is difficult to find a justification for such provisions. No such distinction is made between electors who vote at their homes, and there seems to be no good reason why an absent voter's right to exercise his franchise should be made to depend upon his occupation.

2. Many of the absent voting laws make the right to cast a ballot *in absentia* dependent upon the reason for the absence. Such provisions are of doubtful wisdom. They open the way to litigation, and in any close election in which the votes of the absent voters would be decisive, the defeated party would undoubtedly challenge their right to vote on the ground that their absence was not due to any of the causes allowed by law. In addition to this practical objection it may also be said that it is

unsound in principle to make the absent voter's right to vote depend upon the cause of his absence. The justification of absent voting is the voter's right to a voice in the determination of the questions which affect him and the public's right to have the benefit of his judgment. The enjoyment of these rights should not be dependent upon the cause of his absence.

3. Many absent voting laws make the right to vote dependent upon the place where the voter happens to be on election day. This cannot be avoided if the law is one which requires the voter to appear in person at the polling place where his ballot is cast. But if the law provides some machinery by which his ballot may be cast at home, the place where he himself may happen to be on election day is a matter of indifference.

4. Care should be taken to preserve the secrecy of the ballot. If the absent voter believes that his ballot may be identified, he may be deterred from exercising his privilege. Hence it is not desirable to provide for the absent voter a ballot different in form or color from the ballot used at home. In a small election unit, such as a Massachusetts town, it might easily happen that only one or two absent voters would vote, and if they used ballots different from the ordinary official ballot a secret ballot would be impossible.

A model absent voting law would apply to all voters and their right to vote would not depend upon the cause of their absence nor the place where they happened to be on election day, nor would their ballots be different in any way from the ordinary official ballot.

VI. The Results.

In Norway absent voting has been practiced for more than a century. Its scattered population, difficult traveling and especially its large sea-faring population made such a measure necessary if a large part of its population was not to be habitually disfranchised. The Norwegian Constitution of 1814 provided for absent voting from points within the kingdom. In 1896 Parliament was authorized to extend the system by permitting voting from points without the kingdom. The privilege

has been largely used. For instance in the parliamentary elections of 1912, more than five per cent of the ballots cast were sent in by mail. The privilege is used more largely by women than by men and in rural districts than in cities. The election officers determine whether or not the absent voter has a good excuse for his absence, and in the local elections of 1913 more than a tenth of the ballots offered by absent voters were rejected because the reason given for absence was not satisfactory.

Absent voting has hardly been tried long enough in any part of the United States to afford a thorough test. It is significant, however, that no jurisdiction which has undertaken it has entirely abandoned it, although the form has frequently been modified. A little testimony from public officers who have had experience with this form of voting is available. The Secretary of State of Kansas, writing in 1913, said that the law was first enacted for the benefit of railway men, but had been extended later to all absent voters. About five thousand had availed themselves of it the preceding year and the law had been found to work well. The Secretary of State of North Dakota, as well as Representative Young of that State, expressed satisfaction with the working of the law in that State. In 1917 Governor Stewart of Montana said that the act of 1915 had worked well and recommended that it be extended "to admit of the voting of those physically unable to reach the polls." Governor Sleeper of Michigan recommended that the privilege of absent voting be extended to "all voters legitimately detained from their voting precincts." In Australia and its States absent voters have made considerable use of their privilege, and in 1913 they cast nine and three-fourths per cent of the total vote recorded. The present writer has not found any adverse criticism of the principle of absent voting on the part of any officer or individual in any State where it has been tried. The chief objection which has been made to it is the opportunity for fraud which it offers. It would seem however that a statute could be drawn in such a way as to reduce this danger to a minimum.

Appendix A.

Constitutional Provisions relating to Absent Voting.

Kansas, Art. V, Sec. 3. . . . the legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this State; but nothing herein contained shall be deemed to allow any soldier, seaman or marine in the regular army or navy of the United States the right to vote.

Maine, Art. II, Sec. 4. The election of Governor, Senators and Representatives shall be on the second Monday of September annually forever. But citizens of the State absent therefrom in the military service of the United States or of this State, and not in the regular army of the United States, being otherwise qualified electors, shall be allowed to vote on Tuesday next after the first Monday of November, in the year of our Lord one thousand eight hundred and sixty-four, for governor and senators, and their votes shall be counted and allowed in the same manner, and with the same effect, as if given on the second Monday of September in that year. And they shall be allowed to vote for governor, senators and representatives on the second Monday of September annually thereafter forever, in the manner herein provided. On the day of election a poll shall be opened at every place without this State where a regiment, battalion, battery, company, or detachment of not less than twenty soldiers from the State of Maine, may be found or stationed, and every citizen of said State of the age of twenty-one years, in such military service, shall be entitled to vote as aforesaid; and he shall be considered as voting in the city, town, plantation and county in this State where he resided when he entered the service. The vote shall be taken by regiments when it can conveniently be done; when not so convenient, any detachment or part of a regiment not less than twenty in number, and any battery or part thereof numbering twenty or more, shall be entitled to vote wherever they may be. The three ranking officers of such regiment, battalion, battery, company, or part of either, as the case may be, acting as such on the day of election, shall be supervisors of elections. If no officers, then three non-commissioned officers according to their seniority shall be such supervisors. If any officer or non-commissioned officer shall neg-

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lect or refuse to act, the next in rank shall take his place. In case there are no officers or non-commissioned officers present, or if they or either of them refuse to act, the electors present, not less than twenty, may choose, by written ballot, enough of their own number, not exceeding three, to fill the vacancies, and the persons so chosen shall be supervisors of elections. All supervisors shall be first sworn to support the constitution of the United States and of this State, and faithfully and impartially to perform the duties of supervisors of elections. Each is authorized to administer the necessary oath to the others; and certificates thereof shall be annexed to the lists of votes by them to be made and returned into the office of the secretary of state of this State as hereinafter provided. The polls shall be opened and closed at such hours as the supervisors, or a majority of them, shall direct; *provided, however,* that due notice and sufficient time shall be given for all voters in the regiment, battalion, battery, detachment, company or part of either, as the case may be, to vote. Regimental and field officers shall be entitled to vote with their respective commands. When not in actual command, such officers, and also all general and staff officers and all surgeons, assistant surgeons, and chaplains, shall be entitled to vote at any place where polls are opened. The supervisors of elections shall prepare a ballot box or other suitable receptacle for the ballots. Upon one side of every ballot shall be printed or written the names of the county, and also of the city, town or plantation of this State, in which is the residence of the person proposing to vote. Upon the other side shall be the name or names of the persons to be voted for, and the office or offices which he or they are intended to fill. And before receiving any vote, the supervisors, or a majority of them, must be satisfied of the age and citizenship of the person claiming to vote, and that he has in fact a residence in the county, city, town or plantation which is printed or written on the vote offered by him. If his right to vote is challenged, they may require him to make true answers, upon oath, to all interrogatories touching his age, citizenship, residence, and right to vote, and shall hear any other evidence offered by him, or by those who challenge his right. They shall keep correct poll-lists of the names of all persons allowed to vote, and of their respective places of residence in this State, and also the number of the regiment and company or battery to which they belong; which lists shall be certified by them or by a majority of them, to be correct, and that such residence is in accordance with the indorsement of the residence of each voter on his vote. They shall check the name of every person before he is allowed to vote, and the checkmark shall be plainly made against his name on the poll-lists. They

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shall sort, count and publicly declare the votes at the head of their respective commands on the day of election, unless prevented by the public enemy, and in that case as soon thereafter as may be; and on the same day of said declaration they shall form a list of the persons voted for, with the number of votes for each person against his name, and the office which he was intended to fill, and shall sign and seal up such list and cause the same, together with the poll-lists aforesaid, to be delivered into the office of the secretary of state aforesaid, on or before the first day of December, in the year one thousand eight hundred and sixty-four and on or before the fifteenth day of November annually thereafter forever. The legislature of this State may pass any law additional to the foregoing provisions, if any shall, in practice, be found necessary in order more fully to carry into effect the purpose thereof.

Art. II, Sec. 12. But citizens of this State, absent therefrom in the military service of the United States or of this State, and not in the regular army of the United States, being otherwise qualified electors, shall be allowed to vote for judges and registers of probate, sheriffs, and all other county officers on the Tuesday next after the first Monday in November, in the year one thousand eight hundred and sixty-four, and their votes shall be counted and allowed in the same manner and with the same effect as if given on the second Monday of September in that year. And they shall be allowed to vote for all such officers on the second Monday in September annually thereafter forever. And the votes shall be given at the same time and in the same manner, and the names of the several candidates shall be printed or written on the same ballots with those for Governor, senators and representatives, as provided in section four, article second of this Constitution.

MASSACHUSETTS, Amendments, Art. XLV. The General Court shall have power to provide by law for voting by qualified voters of the Commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants in the choice of any officer to be elected or upon any question submitted at such election.

MICHIGAN, Art. III, Sec. 1. No qualified elector in the actual military service of the United States or of this State or in the army or navy thereof, or any student while in attendance at any institution of learning, or any regularly enrolled member of any citizens' military or naval training camp, held under the authority of the government of the United States or the State of Michigan, or any member of the Legislature while in attendance at any session of the Legislature, or commercial traveler, or any qualified elector employed upon or in the operation of railroad trains in this State,

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or any sailor engaged and employed on the great lakes or in coastwise trade, shall be deprived of a vote by reason of absence from the township, ward or State in which he or she resides; and the Legislature shall provide by law the manner in which and the time and place at which such absent electors may vote and for the canvass and return of their votes: Provided further, That the Legislature shall have power to pass laws covering qualified electors who may be necessarily absent from other causes than above specified.

NEBRASKA, Art. VII, Sec. 3. Every elector in the actual military service of the United States, or of this State, and not in the Regular Army, may exercise the right of suffrage at such place and under such regulations as may be provided by law.

NEVADA, Art. II, Sec. 3. The right of suffrage shall be enjoyed by all persons, otherwise entitled to the same, who may be in the military or naval service of the United States; *provided*, the votes so cast shall be made to apply to the county and township of which said voters were *bona fide* residents at the time of their enlistment; *and provided further*, that the payment of a poll tax or a registration of such voters shall not be required as a condition to the right of voting. Provision shall be made by law regulating the manner of voting, holding elections, and making returns of such elections, wherein other provisions are not contained in this Constitution.

NEW JERSEY, Art. II, Sec. 1. . . . In time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.

NEW YORK, Art. II, Sec. 1. . . . In time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the Legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.

OREGON, Art. II, Sec. 17. All qualified electors shall vote in the election precinct in the county where they may reside for county officers, and in any county of the State for State officers, or in any county of a congressional district in which such electors may reside for members of Congress.

PENNSYLVANIA, Art. VIII, Sec. 6. Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States, or by the authority of this Commonwealth, such electors may exercise the right of suffrage, in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual places of election.

RHODE ISLAND, Amendments, Art. IV. Electors of this State who, in time of war, are absent from the State in the actual military service of the United States, being otherwise qualified, shall have a right to vote in all elections in the State for electors of President and Vice President of the United States, Representatives in Congress, and general officers of the State. The general assembly shall have full power to provide by law for carrying this article into effect; and until such provision shall be made by law every such absent elector, on the day of such elections, may deliver a written or printed ballot, with the names of the persons voted for thereon, and his Christian and surname, and his voting residence in the State, written at length on the back thereof, to the officer commanding the regiment or company to which he belongs; and all such ballots, certified by such commanding officer to have been given by the elector whose name is written thereon, and returned by such commanding officer to the secretary of state within the time prescribed by law for counting the votes in such elections, shall be received and counted with the same effect as if given by such elector in open town, ward, or district meeting; and the clerk of each town or city, until otherwise provided by law, shall within five days after any such election transmit to the secretary of state a certified list of the names of all such electors on their respective voting lists.

SOUTH DAKOTA, Art. VI, Sec. 19. . . . Soldiers in time of war may vote at their post of duty in or out of the State, under regulations to be prescribed by the Legislature.

UTAH, Art. I, Sec. 17. . . . Soldiers in time of war may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.

Appendix B.

Table of Statutes relating to Absent Voting.

Arizona — Acts, Resolutions and Memorials, 1918, ch. 11.
Arkansas — Public and Private Acts, 1917, Art. 175.
Colorado — Laws of 1915, ch. 76.
Connecticut — Act of March 21, 1918.
Delaware — Revised Statutes, 1915, ch. 60, Art. 4.
Florida — General Acts and Resolutions, 1917, ch. 7380.
Idaho — General Laws, 1917, ch. 142.
Illinois — Laws, 1917, page 434.
Indiana — Laws, 1917, ch. 100.
Iowa — Supplemental Supplement to the Code, 1915, ch. 3-B; Title VI. Acts and Joint Resolutions, 1917, ch. 419.
Kansas — General Statutes, 1915, ch. 33, Art. 11.
Kentucky — Acts, 1918, ch. 37, secs. 6–10.
Maine — Revised Statutes, 1917, ch. 7, sec. 80.
Massachusetts — General Acts, 1918, chs. 293, 295.
Michigan — Public Acts, 1917, No. 203, ch. XII.
Minnesota — Session Laws, 1917, ch. 68.
Mississippi — Laws, 1917, ch. 35.
Missouri — Laws, 1917, p. 275.
Montana — Laws, Resolutions and Memorials, 1917, ch. 18.
Nebraska — Laws and Resolutions, 1918, ch. 1.
Nevada — Statutes, 1899, ch. 94; Statutes, 1917, ch. 197, sec. 101.
New Hampshire — Laws, 1917, ch. 95.
New Jersey — Compiled Statutes, II, 2144.
New Mexico — Laws, 1917, ch. 89, sec. 14.
New York — Laws, 1917, ch. 815.
North Carolina — Public Laws and Resolutions, 1917, ch. 23.
North Dakota — Laws, 1918, ch. 6.
Ohio — Legislative Acts, 1917, p. 52.
Oklahoma — Session Laws, 1917, ch. 157.
Oregon — General Laws, 1915, ch. 225, sec. 17.
Pennsylvania — Stewart's Purdon's Digest, II, 1367.
Rhode Island — Public Laws, 1918, chs. 1610, 1657.
South Carolina — Acts and Joint Resolutions, 1918, No. 574.
South Dakota — Laws, 1917, ch. 233.
Tennessee — Public Acts, 1917, ch. 8.

Texas — Laws, First Called Session, 1917, ch. 40.
Vermont — Acts and Resolves, 1915, No. 1, sec. 5.
Virginia — Acts and Joint Resolutions, 1916, ch. 369.
Washington — Session Laws, 1917, ch. 159.
West Virginia — Acts, Second Extra Session, 1917, ch. 13.
Wisconsin — Statutes, 1915, p. 90.
Wyoming — Session Laws, 1915, ch. 102.

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BULLETIN No. 24

COMPULSORY VOTING

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COMPULSORY VOTING.

Compulsory Voting in the United States.

At the present time compulsory voting does not exist anywhere in the United States. Many years ago the State of Missouri inserted in the charter of Kansas City a provision to the effect that a poll tax of $2.50 should be levied upon every male resident of legal age, but exempted from payment of this tax all those who voted at the general election. In Kansas City *v.* Whipple, 136 Mo. 481, this law was held to be contrary to the State Constitution as discriminatory and as imposing a penalty upon electors for failure to exercise the free right of suffrage, an action which could not be made compulsory.[1] There was at the time considerable discussion as to the merits of this decision, and it is not certain that other courts would regard it as a precedent to be followed.

A measure similar to the Missouri statute was recommended by Governor Butler of Massachusetts in 1883, but no action was taken upon it. This recommendation was made, however, not because of any desire on the part of the Governor to compel electors to vote, but only as a means of assisting in the repeal of the law which made voting dependent upon the payment of a poll tax.[2]

By an act adopted in Oklahoma in February, 1916, it is declared to be "the duty of every qualified elector in this State to register as an elector under the provisions of this act."[3] No attempt is made to enforce registration, but the act provides that the registration of any voter who fails to vote at three successive elections held in his precinct shall be cancelled.[3]

Compulsory voting is mentioned in only one of the constitutions of the forty-eight States.[4] This is the Constitution of

[1] See *Harvard Law Review*, X, 439, 440.

[2] *Massachusetts Senate Doc. No. 1 (1883)*. 15.

[3] *Session Laws of Oklahoma, 1916*, ch. 24, sec. 2.

[4] Since this bulletin was prepared, a constitutional amendment providing for compulsory voting has been adopted in Massachusetts. For the text see *post*, 239.

North Dakota, which provides that "The Legislature . . . may prescribe penalties for failing, neglecting, or refusing to vote at any general election."[1] Thus far the Legislature has not passed any act in execution of this permissive power.

Compulsory Voting in Foreign Countries.

(*a*) *Austria.*

"The Austrian Constitution provides for two houses, one of which, the House of Representatives, is elected by the people. Besides this parliament, similar to Congress, each province of Austria has its own legislative assembly for matters concerning the province alone.

"The law of January 26, 1907, regulating elections in Austria, does not make voting compulsory, but its paragraph No. 4 contains the following provision:

> The Legislative Assembly of the province has the right to decree that every franchised citizen can be compelled to vote at the election of the members of the House of Representatives. In this case the Legislative Assembly of the province is competent to issue detailed regulations regarding the compulsory voting and modes of procedure and enforcement, eventually by introducing the procedure of mandate (Mandats-Verfahren).

"Said procedure works in the following way:

"The law must be, of course, published in the legal way and therefore nobody can excuse himself that he did not know it. Franchised persons, who failed to comply with their duty, receive a summons to pay a certain fine, which amount is fixed by the Legislative Assembly, or to make their objections within fourteen days. If this period [has] elapsed, no more objections are allowed.

"As a matter of fact, only one province has adopted the system of compulsory voting and enforces it in the above described way. The foregoing refers to the elections for the House of Representatives.

"In order to regulate the procedure of the elections for the Legislative Assembly (*Landtag*) of a province, this Assembly

[1] *Constitution of North Dakota*, Art. II, Amendments, Sec. 127.

itself has the right to make voting compulsory, but until now only two provinces have done so. It is enforced as mentioned above." [1]

(*b*) *Belgium.*

Electors necessarily absent on election day may notify the officials, stating the reasons therefor. If these are satisfactory, the absentee is excused and no penalty attaches. For failure to vote, and in the absence of satisfactory excuse, the first offense is punished by reprimand or a fine of from one to three francs; the second offense within six years, by a fine of from three to twenty francs. The third offense within ten years may be punished by the same fine, and the elector's name posted for a month in a public place. For a fourth offense within fifteen years, the elector is punished in addition to the fine by having his name stricken from the list and being for ten years rendered ineligible for any civic office or emolument.[2]

Professor Léon Dupriez of the University of Louvain, whose thorough study of the subject of compulsory voting has been widely recognized, has prepared for this Bulletin the following statement concerning the experience of Belgium:

"The compulsory vote was introduced into the Belgian Constitution at the same time as universal plural suffrage in 1893. The question of the compulsory vote had never been seriously discussed in Belgium before it was submitted to the Constituent Chambers in 1892 by the Prime Minister, M. Beernaert. It was first received with astonishment; but it very quickly won favor with all parties and was finally adopted almost without opposition.

"The argument which won over the leaders of Belgian public opinion is as follows: suffrage is not an individual right of the citizen which he can use and abuse as his personal and particular interests dictate; it is rather a function and a duty which is entrusted to him in order to insure the good government and the general interests of the nation. Every free government rests on the national will as expressed by the electorate. But this national will, which alone ought to make the law and con-

[1] Letter from the Acting Consul for Austria-Hungary at Cleveland, Ohio, quoted in W. T. Donaldson, *Compulsory Voting and Absent Voting*, 24.

[2] *Encyclopedie du Droit Civil Belge*, Title VII, Art. 220-223, pp. 620, 621, cited by Donaldson, 24.

trol the government, will never be expressed or known if the voters neglect to go to the polls. Too much neglect of this duty will not only hinder the expression of this will, but will render it uncertain and doubtful and even falsify it by displacing the true majority.

"Belgium has, by law, organized the means for enforcing compulsory voting in a way that is very simple and not at all severe. After the closing of the polls the presiding officer of each polling place draws up and sends to a justice of the peace a list of the electors who have not voted. In the following week every elector who did not cast his vote can send the justice of the peace a letter setting forth the reasons which justified his absence and the means of proving them, such as a medical certificate. The law itself has not determined what are the legitimate causes for failing to vote; it has left to the justice of the peace the duty of deciding in each particular case whether the excuse presented by the elector is a valid one, and if so, the elector is not prosecuted. If the excuse is not accepted, he receives a summons by mail, ordering him to appear before the justice of the peace, and after his explanations have been heard the case is decided by the justice without appeal. The penalties which the justice can pronounce are slight. The first offense is punishable either by a reprimand or by a fine of from one to three francs (twenty to sixty cents). A second absence within six years is punishable by a fine of from three to twenty francs (sixty cents to four dollars). The third offense within ten years is punishable by the same fine and the name of the offender is posted on the walls of the City Hall for one month. Finally, the elector who fails to vote for the fourth time within fifteen years without good cause is dropped from the electoral lists for a period of ten years and during this time cannot receive any nomination, decoration or mark of honor from the public authorities.

"Compulsory voting in Belgium has been very successful. During the last twenty years the number of registered electors who have failed to vote has never been over six per cent, and has even been less than four per cent. But it must be noted that the voters' lists are made up in Belgium on the first of July and that the elections do not occur until the first of the

following June. During these months some electors die, some leave Belgium, and some lose the right to vote either because of conviction of crime or because of some other disability. These causes are sufficient to explain at least a third of the failures to vote. Another important cause of absence from the polls is the custom of many peasants of the Flemish provinces to go to France temporarily to gather the harvest; there are a large number of *arrondissements* from which this emigration takes place where the number of absentees rises to ten and twelve per cent. The other causes of failure to vote which are most common and recognized as legitimate are extreme old age, sickness, and absence from the country. The elector who has changed his residence since the last revision of the voters' lists must return to his former residence to vote, but he receives free transportation both ways on the government-owned railroads.

"Indeed, cases of intentional and illegal absence are exceedingly rare; the statistics show that out of a thousand electors only six are prosecuted and less than three are convicted.

"Clearly it is not the fear of possible punishment which makes so large a number of the Belgians vote. On the contrary, the Belgian people are not accustomed to submit silently to a rigorous discipline; they are used to enjoying the fullest amount of liberty and are by nature very independent and even inclined to find fault with all public authority. How then are we to explain the success of compulsory voting? Primarily because the compulsory vote was imposed at the same time that the right of suffrage was first granted to the people as a whole. They had struggled energetically to gain the right to vote, with which they hoped to improve their condition. With the same enthusiasm they accepted the right and duty of exercising this function. Since in Belgium political contests are extraordinarily keen and exciting, and as they touch the most profound emotions of the human heart and the deepest feelings, he who is not interested is not in any sense a citizen, and to the majority these contests are of vital importance. Moreover, the Belgian people have always been divided into two parties or groups of parties almost equal, so that at each election the fate of the parliamentary majority and the

government is at stake and depends on the votes of small bodies of electors; accordingly each man feels the great importance of his vote. Finally, the introduction of proportional representation in 1900 has helped to maintain and to increase still more this remarkable proportion of electors who vote; thanks to proportional representation every Belgian voter has the opportunity to vote for the men of his own party who represent his desires and his interests, with the hope, even with the certainty, that some candidates of his choice will be elected."

(c) *Spain.*

Compulsory voting in Spain was introduced by the law of August 8, 1907, and applies to elections to the national Chamber of Deputies and to the city councils. According to this law "every elector has the right and the duty to vote in all the elections convoked in his district." (Art. 2, Part 1.) Those exempted from the duty of voting are those persons seventy years of age or over, the clergy, the judges of first instance in their respective districts, and the public notaries in the territory of the notarial college where they exercise their functions.

The electors not comprehended in any one of the above classes who, without legitimate cause, fail to vote in any election are punishable (1) by the publication of their names as a censure for having left unfulfilled their civic duty, and (2) by an additional tax of two per cent upon the taxes which they pay to the state until they do vote in another election.

In case of a repetition of the offense, besides the above punishment the elector is disqualified from holding public office, whether by election or appointment, and cannot be nominated until he votes in an ensuing election.

Besides those who by the law itself are exempted from the duty of voting, there are also exempted from punishment those who are candidates for the Chamber of Deputies or the city council and those who are unable to vote because of sickness, absence, or other justified cause.

An elector who desires to secure an excuse for his failure to vote must present himself before the municipal board of the electoral census, which will pass upon his case. In the event

of an unfavorable decision by this tribunal, the elector may appeal within ten days to the provincial board, whose decision is final.

In a report on the working of compulsory voting in Spain, prepared for this Commission by Dr. Cesar Barja, there is the following illuminating criticism:

"The introduction of compulsory voting in Spain was due to the wonted negligence of the Spanish people in attending the polls, owing to two factors — ignorance and *baciquismo* (bossism). But the condition of political life in Spain is just the same to-day as before the new electoral law went into effect. *Baciquismo* has not been destroyed, and no more electors vote now than before 1907. It is not too much to say that at least one-third of the people who have the right of suffrage do not vote at all. However, it is necessary to draw a distinction between the different provinces and regions which comprise the Spanish nation. In Catalonia, the Basque Provinces, Navarre, and in the large cities where the people are better educated, possibly ninety per cent of the electoral body attend the polls; but in other regions, like Andalusia, where education is not widespread, not more than half the people vote — in some provinces, indeed, only a third of them. The election of representatives for the Chamber of Deputies is more a question of appointment by the central government than of choice by the free will of the people.

"I have no statistical information upon the numbers who vote nor the punishments inflicted, but in the ten years which have elapsed since the law went into effect I do not know of any case in which the punishment provided was imposed; but I do know of hundreds of cases in which electors, even whole districts, did not vote at all. Ignorance and bossism have not ceased to exist, and the Spanish people are to-day as negligent as ever in voting. If improvement has taken place within the last ten years, it is not to be attributed to the law, but to the improvement of the public and private life of the Spanish nation. The law itself has done nothing, but of course such a negative result is to be imputed not to the law, but to the people to whom the law is given." [1]

[1] Cesar Barja, *Compulsory Voting in Spain*, a manuscript report prepared in May, 1917, on file in the Massachusetts State Library.

(*d*) *Switzerland.*

"Voting is obligatory on cantonal matters in the Cantons Zurich, Schaffhausen, St. Gallen, Aargau, and Thurgau. These Cantons show average votes of from 70 to 80 per cent; but the obligatory measure is not rigorously enforced. Small fines are imposed upon people failing to vote unless an adequate excuse is made. This includes illness in the family, mourning for a relative, absence, birth in the family, etc. St. Gallen goes further than its neighbors and excuses the parent and god-parent from the duty of voting if their presence is necessary at a christening. Those who have 'official business' to attend to are also excused. In Thurgau forestry officials in service and clergymen who intend to preach on election day are not required to vote unless they desire. Elections are usually held on Sundays, and sometimes the polls are open Saturday nights for a couple of hours."[1]

In comparing the vote on referendum measures in the two cantons of Zurich and Berne, it will be found that the proportion of electors taking part in such elections is much larger in Zurich. President Lowell ascribes this difference to the fact that in Zurich an elector who fails to vote is fined.[2]

(*e*) *New Zealand.*

"If an elector, who is not a candidate at a general election, nor prohibited by law from voting at the election, fails to vote at such election his name is expunged from the voting list; and unless he appears and excuses the neglect to the satisfaction of the court, he loses his vote at the next election. This system was put in practice in 1893 and has been enforced ever since."[3]

(*f*) *Tasmania.*

"Sec. 36. The Returning Officer shall, after every General Election of Members of the Assembly or Periodical Election of Members of the Council, strike out the name of every person

[1] Leo J. Frankenthal, Vice-Consul to Berne, Switzerland, 1908. Senate Document 126, 61st Congress, 1st Session, cited in Donaldson, 25.

[2] Lowell, *Governments and Parties in Continental Europe*, II, 273.

[3] *New Zealand Statutes*, also Sec. 126, Electoral Act, 1893, cited in Donaldson, 25.

upon the Electoral Roll in respect of any other qualification other than that of owner or occupier of property, who, not being prohibited by law from voting at such Election, has failed to vote thereat."[1]

It should be observed that in most of the Catholic countries of Europe the elections are held on Sundays, making it easily possible to secure a large vote without interfering with a voter's employment. It should also be noted that in no country do the elections come with such frequency as in the United States and that the burden upon the voter is nowhere so great as here.

NOTE. — Since the preparation of the foregoing account the Constitutional Convention of Massachusetts submitted to the people the following amendment, and it was ratified November 5, 1918:

The General Court shall have authority to provide for compulsory voting at elections, but the right of secret voting shall be preserved.

[1] Electoral Act, 1901, *Tasmania Statutes*, cited in Donaldson, 25.

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BULLETIN No. 25

THE ABOLITION OF CAPITAL PUNISHMENT

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THE ABOLITION OF CAPITAL PUNISHMENT.

I. Capital Punishment in Europe.

Capital punishment has found a place in the legal systems of all times and countries, although the causes for which it has been inflicted have greatly varied. The Mosaic law prescribed death for a large number of offenses. The name of Greece will always be associated with the code of Draco and the drinking of the hemlock by Socrates. In Rome not only the state but the head of the family (*paterfamilias*) exercised the power of life and death (*patria potestas*). Throughout the middle ages, the new states which grew up on the ruins of the Roman Empire carried over the principle which was common to the Jews, the Romans and the primitive Germans, that the taking of life must be atoned for by the sacrifice of the life of the malefactor. The Roman Catholic Church shared the prevailing opinion. One of its most authoritative spokesmen, St. Thomas Aquinas, said:

> If any man be dangerous to the community and be corrupting it by any crime, the killing of him for the common good is praiseworthy and wholesome. . . . The slaying of an evil doer is lawful, inasmuch as it is directed to the welfare of the whole community.[1]

Among all the countries of Europe, few, if any, had more severe penal laws than did England, and they retained this character well into the nineteenth century. Offences which would now be punished only by a fine or a short term of imprisonment were punishable by death. In the reign of Henry VIII (1509–1547) it is estimated that 72,000 persons were hanged for vagabondage.[2] The slow growth of a sentiment in favor of a mitigation of the severe penalties of English criminal law is well evidenced by a debate in the House of Lords in 1810, when a bill was under consideration for the

[1] Aquinas, *Ethicus*, II, 40, 42.

[2] Karl Marx, *Das Kapital*, ch. XXVIII, cited in Garofalo, *Criminology*, 247. These figures, even though vouched for by two such scholars as Marx and Garofalo, seem of incredible magnitude. The numbers given by mediæval chroniclers are notoriously exaggerated, and Holinshed, the chronicler of Henry VIII, is probably no more reliable.

repeal of a statute which made shop lifting to the extent of five shillings a capital offence. Lord Ellenborough, one of the most distinguished judges in England, felt that this act threatened the foundations of society, and he said to the House:

> My Lords, if we suffer this Bill to pass we shall not know where we stand; we shall not know whether we are upon our heads or our feet.[1]

The great Chancellor, Lord Eldon, shared the views of Lord Ellenborough. The bill was rejected by a vote of 31 to 11.

The record of England, however, is not so sanguinary as the language of her statutes would lead one to expect. Laws which ran counter to public sentiment could not be enforced, and long before the requisite votes could be obtained for their modification their severity had been much mitigated by non-enforcement. In 1805, for instance, 350 persons were sentenced to death, but of these only 68, including 10 murderers, were actually executed. In 1815, 553 were sentenced, but only 57 (15 murderers) were executed. In 1825 the number sentenced was 1,036, of whom 50 (10 murderers) were put to death, while in 1831, 1,601 persons were sentenced, of whom only 52 (12 murderers) suffered the extreme penalty.[2]

The movement for the abolition of capital punishment in Europe first received decided impetus from the publication by the Marquis Beccaria in 1764 of his epoch-making book, "Essay on Crimes and Punishments." Russia, although generally regarded as more backward in civilization than the countries of western Europe, had already abolished capital punishment in 1750 for all except political offences. The noble-minded Joseph II included it among the reforms which he introduced into the Hapsburg empire, but it was restored after his death. In Portugal it was abolished in 1846, in Holland in 1870, and in Norway in 1902. In Italy various states which united to form the present kingdom had abolished the death penalty and in 1886 this was made the law for the entire country. In Germany the process was reversed. Eight states had abolished the death penalty in the period from 1849 to 1869. But after the formation of the Empire in 1871, the adoption of the

[1] Cited by John Bright in his speech of June 12, 1877. See Hansard, *Debates*, June 12, 1877, 1701. The remarks attributed to Lord Ellenborough do not appear in Hansard's report of his speech.

[2] Pike, *A History of Crime in England*, II, 452.

Imperial Criminal Code in 1872 re-established it throughout the country. In the western hemisphere capital punishment has been abolished in Brazil, Mexico, Costa Rica and Venezuela.

II. Capital Punishment in America.

The first State in the Union to abolish the death penalty was Michigan, which took that action in 1846. Rhode Island followed in 1852, Wisconsin in 1853, Maine in 1876, Kansas in 1907, Minnesota in 1911, Washington in 1913, Oregon in 1914, North Dakota and South Dakota in 1915 and Arizona in 1916.

When the District of Maine was separated from Massachusetts in 1820 and admitted to the Union as a State, it retained the six capital crimes of the parent State, but in 1829, ten years before similar action was taken in Massachusetts as to any of these offenses, the penalty for rape, burglary and robbery was reduced to imprisonment for life. In 1837 it was provided that there should be no execution of a convicted murderer until after the lapse of a year and a day from the date of his sentence and until such time as the Governor should sign a warrant for his execution. The responsibility thus imposed upon the Governor had the same effect as a similar law later had in Kansas, and for nearly thirty years no execution took place. In 1867 the Governor called the attention of the Legislature to the fact that there were then in State's prison under sentence of death ten persons, one of whom had been there more than twenty years. Two years later the Legislature passed an act requiring the Governor and Council to review the finding of the court in the case of every prisoner sentenced to death and commute, pardon or cause the prisoner to be executed within a certain time from the date of the sentence. In 1876 the death penalty was entirely abolished. An attack upon a keeper by an insane convict led in 1882 to the restoration of the death penalty, but in 1887 it was again abolished.

In Rhode Island an act passed in 1882 provides that a convict serving a life sentence who commits murder may be put to death. The North Dakota act of 1915 contains a similar provision. Colorado abolished capital punishment in 1897, but several lynchings led to its restoration in 1901. Iowa

abolished it in 1872 and restored it in 1878. In both States the jury may impose a sentence either of death or of life imprisonment. Several other States vest a similar discretion, "jury option," in the jury.

The subject was discussed at considerable length in the Ohio Constitutional Convention of 1912, with copious references to the Mosaic law by those who wished to retain capital punishment and strong appeals to sympathy on the part of those who advocated its abolition. Little in the way of tangible evidence was adduced from which it could be determined whether or not capital punishment operated as a deterrent of crime. By a vote of 63 to 31, the following form of amendment was adopted for submission to the people:

> All persons shall be bailable by sufficient sureties, except those charged with murder in the first degree, where proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted; nor shall life be taken as a punishment for crime. Until otherwise provided by law, persons convicted of crimes heretofore punishable by death shall be punished by imprisonment in the penitentiary during life.

The above amendment was rejected by the people by a vote of 303,246 to 258,706.

The subject was also before the New York Constitutional Convention of 1915, and a proposed amendment for the abolition of capital punishment was favorably reported to the Convention but was not adopted. See Appendix D, *post*.

Of the eleven States which have abolished the death penalty only one, Oregon, has done so by constitutional amendment. This was accomplished by adding another section to the first article of the Constitution. Two States, South Dakota and Arizona, have provided for the abolition of the death penalty by amending their Penal Code, while the other eight have made the change by special statute.

Rhode Island and North Dakota are the only States which have modified the terms of pardon at the same time and in connection with the abolition of the death penalty. In Rhode Island a pardon, where an offender is convicted of a crime punishable by not less than five years' imprisonment, requires

the "concurrent recorded vote of three-fourths of all members elected to each house of the General Assembly and approved by the Governor." North Dakota provides that no one convicted of murder in the first degree shall be eligible for pardon until he shall have been confined for "at least 50 per cent of the time of his life expectancy . . . based on the life expectancy tables known as the Carlisle tables of mortality," but a pardon may be granted without this restriction in any case when innocence is proved. In Arizona a pardon may be granted only on the presentation of new evidence which convinces every member of the Board of Pardons of the prisoner's innocence.

At the present time there are nine States in which the death sentence is not inflicted under any circumstances. These are Arizona, Kansas, Maine, Michigan, Minnesota, Oregon, South Dakota, Washington and Wisconsin.

There are two States, Rhode Island and North Dakota, in which it is inflicted only upon a prisoner who is serving a life sentence.

There are two States, Louisiana and Virginia, in which the death penalty may be imposed for five offenses, viz., murder, rape, arson, and burglary in both, and for kidnapping in Louisiana and for robbery in Virginia.[1]

There are three States in which it may be inflicted for four offenses. These are Alabama, Delaware and North Carolina. In Alabama the capital offenses are murder, robbery, rape and arson. In the others, they are murder, rape, arson and burglary.

There are three States in which there are three capital crimes. These States are Maryland, Mississippi and South Carolina, and the crimes are murder, rape and arson.

There are ten States in which there are two capital crimes. These States are Arkansas, Florida, Georgia, Kentucky, Missouri, Oklahoma, Tennessee, Texas, Vermont and West Virginia. In Vermont the capital crimes are murder and arson. In Tennessee they are rape and any offense committed by a life convict which was punishable by death prior to 1915. In all the others, they are murder and rape.

In the remaining twenty States the only capital crime is murder.

[1] In this and the following paragraphs no account is taken of treason, — an offense which occurs so rarely as to be negligible.

III. Experience of States without Capital Punishment.

The experience of States which have made an extended trial of a system of criminal law which makes no provision for capital punishment is of value. While it is difficult to obtain tangible data and while the influence upon conduct of any system of law must remain one of the "imponderables," nevertheless the opinion of officials who have had to deal with such a system is entitled to consideration. Such testimony, given in some cases at intervals of several years, is available for the four States which have tried the system longest.

Michigan. — The statute by which capital punishment was abolished in Michigan — the first State in the Union to take such action — was passed in 1846 and went into effect March 1, 1847. In 1851 the Secretary of State, in answer to questions from a committee of the Legislature of New York, submitted certain statistics as to the number of indictments for murder before and after the enactment of the law, and while disclaiming much value for them because of the short period of time which they covered, he added:

> All that can be claimed and I presume all that any friend of the abolition of the death penalty in this State will claim, is, that the results thus far are not against the present law, and certainly not such that any change can be fairly demanded.

In 1864, after the law had been in force seventeen years, the Governor of Michigan, Austin Blair, wrote:

> There is no doubt that public opinion sustains the present law and is against the restoration of the death penalty.

On the other hand, the mayor of Detroit is quoted as saying, in 1870:

> I am of the opinion, after a residence in this State of over sixteen years, that the security of life would be increased, and the ends of justice promoted by the adoption of capital punishment for murder in the first degree, when the party is convicted upon positive evidence.

In 1877, Z. R. Brockway, then just at the beginning of his notable career as superintendent of the Elmira, N. Y., Reform-

atory, after having served in a similar capacity in Detroit, said:

> During my late residence in the State of Michigan, where the death penalty had not been inflicted for more than a quarter of a century, I had occasion to look up the matter to the following extent: — The number of committals to the State Prison annually, for crimes involving killing, is no more now and has not been more in any year since the death penalty was abolished than it was at the beginning, and the population has increased fourfold. I consider this a very strong fact, especially when taken in connection with the circumstances that in the absence of the death penalty convictions and committals to prison for killing are much more easily obtained.[1]

It is perhaps of some significance that in the Michigan Constitutional Convention of 1907 the subject was not mentioned.

Rhode Island. — In 1905, Attorney-General Stearns, just before terminating a connection of eight years with the office of Attorney-General — four years as Assistant Attorney-General and four years as Attorney-General, — expressed the opinion that capital punishment ought to be restored. Apparently his conclusion was based chiefly upon the abuse of the pardoning power. As almost forty per cent of all the life prisoners in Rhode Island from 1838 to 1904 had been pardoned after serving an average term of eleven years, fifteen and one-half days, his conclusion is not strange. In 1912, however, Governor Pothier wrote:

> Capital punishment was abolished in Rhode Island in 1852, and there is no pronounced movement at all in favor of its restoration.[2]

In 1913 the Special Committee on the Revision of the Criminal Laws of Rhode Island reported as follows on the question of restoring the death penalty:

> We do not recommend a return to the death penalty as a punishment for the crime of murder. It is possible that upon this question we are influenced by our personal sentiments, but whether such be the case or not, it remains a fact, that we have discovered no indication of a preponderating public sentiment in favor of the death penalty, nor has aught been presented to us that would support the theory that such a penalty is a greater protection to the community against crimes of violence and homi-

[1] Hansard, *Debates*, June 12, 1877, 1680.

[2] *Proceedings and Debates of the Constitutional Convention of Ohio, 1912*, II, 1261.

cide than is life imprisonment. If it be urged that for the life prisoner there is always the prospect of a pardon, it can be urged with equal force that the average jury will sometimes hesitate to convict when its verdict of guilty means the taking of human life.[1]

Wisconsin. — In this State capital punishment was abolished in 1853. Twenty years later, in 1873, Governor Washburne wrote:

It is twenty years since the abolition of capital punishment. No State can show greater freedom from homicidal crime. With a population representing almost every nationality, statistics show that crime instead of increasing with the growth of the State has actually diminished.[2]

In 1912 Governor McGovern wrote:

More than fifty years ago capital punishment was abolished in Wisconsin. There is no movement here to restore capital punishment, the people being well satisfied with the present law.[3]

In 1915, Governor Dunne of Illinois said:

Illinois was disgraced by 651 homicides in 1910, after a century of enforcement of capital punishment, while in Wisconsin, where it had been abolished, the homicides have not been much over fifty per cent, per capita, of those committed in Illinois.[4]

Maine. — In 1898, Attorney-General Haines (afterward Governor of Maine) compiled from the reports of his predecessors for a period of twenty years a table showing year by year the number of prosecutions for homicide and the number of cases in which sentence was imposed. In commenting upon the figures obtained, the Attorney-General said:

These statistics show, what I have found to be a fact by a further examination of the Attorney-General's reports, and what I think will be found from a careful investigation of the crime of homicide within our State from the earliest times, that the commission of this crime is not very much affected by the law providing the punishment for it. In some years there will be very few cases, and in other years many. . . . If there is any argument to be deduced from this investigation, to my mind it sustains the

[1] *Report of the Special Committee on the Revision of the Criminal Laws of Rhode Island* (1913), 14.
[2] *Fortnightly Review*, LII, 332.
[3] *Proceedings and Debates of the Constitutional Convention of Ohio, 1912*, II, 1260.
[4] *Proceedings of the Eighth Meeting of the Governors, 1915*, 152.

position that when a person commits the crime of homicide, either premeditated or in the heat of passion, and especially as the result of an attempt to commit another crime, the question of the results of such acts is but little thought of, and the murderer little expects being brought to justice and sentence when the crime is committed.[1]

At the Conference of Governors in 1915, Ex-Governor Haines stated that public sentiment in Maine was overwhelmingly in accord with the present law.[2]

IV. Determining Considerations.

Aside from the moral aspects of the question, it would seem that the abolition or retention of capital punishment should depend upon the following considerations: (1) Does capital punishment act as a deterrent to crime; (2) Does the existence of capital punishment make juries reluctant to convict persons charged with a capital offense and thus lead to a lax administration of the criminal law; (3) Are the effects of the execution of criminals upon the community salutary; (4) Would the abolition of capital punishment leave society with any adequate protection against those who have been convicted of murder?

1. Whether or not the death penalty acts as a deterrent to crime is incapable of exact determination. In some jurisdictions the abolition of the death penalty has been followed by a great increase in the number of murders. In others, there has been no increase and in some instances there has even been a decrease. How much of this is cause and effect it is impossible to determine. Judges and prosecuting officers and expert criminologists are divided in opinion. The eminent Italian jurist, Garofalo, says:

> In Italy, where, except in the army, no executions have taken place since 1876, the more serious forms of crime have attained almost incredible proportions. Whereas in England the annual average of homicides is only 300, Italy, with an almost equal population, has an annual average of 3,814, of which nearly one-third are true cases of murder. Since 1892 there has been little change in the figures, the number in 1899 being 3,586. Perhaps the reason is that the criminal saturation has reached its maximum. Whether capital punishment exists or not, in no country are all

[1] *Report of the Attorney-General of Maine, 1897–8*, 13.
[2] *Proceedings of the Eighth Meeting of the Governors*, 176.

the citizens likely to amuse themselves by cutting each other's throats. The only thing is that with the death penalty absent, those who are inclined to this form of diversion have no longer any reason for hesitation.[1]

On the other hand, the equally eminent German physician and scientist, Aschaffenburg, comes to the opposite conclusion. He says:

It is essential, however, that we should consider whether capital punishment acts as a deterrent; I can scarcely believe that it does. German statistics do, indeed, show that the number of those condemned to death has decreased somewhat, but only very little. Belgium, on the other hand, where no capital punishment has been carried out for years, has also had no increase of the crimes for which capital punishment is the penalty. Observations show that the effect of executions is by no means deterrent. Ferri had the opportunity of being present at two executions in Paris. His remarks show that their effect on the suburban population of Paris was the very opposite of what was hoped for. Instead of dull terror, he saw curiosity, pleasure in the unusual sensation, betting as to what the demeanor of the condemned man would be, everything, in fact, rather than the solemnity suitable to such a sad occasion. It can positively be asserted that the peculiar rôle played by a person condemned to death, the attention that his deeds, his life, his behavior at the time of the execution, arouse, thanks to the public love of sensation to which the press caters, are an actual attraction to a number of psycho-pathological individuals. The fear of lifelong imprisonment would probably have a more wholesome effect on the peculiar individualities of assassins and their ilk than does the martyr's halo of glory, the imagined fame of a sensational execution.[2]

American experience seems to bear out the conclusions of Aschaffenburg. The Governor of Wisconsin, writing in 1864 and having in mind the situation in that State both before and after the abolition of capital punishment, said:

The evil tendency of public executions, the great aversion of many to the taking of life, rendering it almost impossible to obtain jurors from the more intelligent portion of the community, the liability of the innocent to suffer so extreme a penalty, and be placed beyond the reach of the pardoning power, and the disposition of courts and juries not to convict, fearing

[1] Garofalo, *Criminology*, 381. Doubt is cast upon the soundness of Garofalo's conclusion by the fact that the great increase in murders which he notes is confined largely to southern Italy. If it were due to the abolition of capital punishment one part of the country should be affected as much as another, yet in Tuscany, where there have been no executions for a century, the number of murders in proportion to population is only one-tenth the number in Sicily.

[2] Aschaffenburg, *Crime and Its Repression*, 266.

the innocent might suffer, convinced me that this relic of barbarism should be abolished. The death penalty was repealed in 1853. No legislation has since re-established it, and the people find themselves equally secure.[1]

In Maine, which abolished the death penalty in 1876, it was restored in 1883. In 1885 the Governor said that during the preceding two years there had been an unusual number of cold-blooded murders and that the restoration of capital punishment had not had the results anticipated.

In a remarkable article written by three prisoners awaiting execution, they raise the query as to the deterrent effects of capital punishment and answer it from their own experience. They said:

> Can you recall a single instance in all your life where the horror of the death penalty stayed the hand of the murderer? We know we never gave it a thought.[2]

Whether or not the severity of the punishment prevents the commission of crime would seem to depend on the state of mind of the criminal. If it be true, as many persons believe, that every murderer commits his crime either under the influence of stimulants or of so strong a passion that he does not reason about the act at all, or if he is convinced that he has taken such precautions that he will avoid detection and thus escape punishment, it would seem that the nature and severity of the punishment could have no effect in preventing the crime. Furthermore, it is generally agreed among the students of crime and criminals that the certainty of punishment is a more efficacious deterrent than is its severity.

2. Does the abolition of capital punishment make juries more ready to convict when the evidence justifies it? A priori it would seem that this must necessarily be the case. It is easy for a legislature, considering crime in the abstract, to decree that he who deliberately takes a human life shall forfeit his own life. It is not so easy, however, for twelve men sitting in a jury room, who have been watching a prisoner for days and who have perhaps come to feel a certain compassion for him, to take an abstract view of the question. What impresses them

[1] Hansard, *Debates*, May 3, 1864.

[2] Kane, Vogt and Campanelli, "From the Death House," *Forum*, LV, 627 (1915).

most strongly is that they have the responsibility of saying whether or not this particular individual shall be put to death. In the State of Kansas capital punishment was practically abolished many years before it was done by statute, because of the unwillingness of one of its Governors to take this responsibility. The law of Kansas required that no prisoner should be executed except by the written authority of the Governor. An incumbent of that office refused to assume the responsibility which the law placed upon him and during his term no executions occurred. When his successor was confronted by the same situation, he felt that it would be unjust to send any newly convicted prisoner to execution unless all those who were under sentence were awarded the same fate. In consequence, no executions took place during his term. All his successors followed the same course, and as a result capital punishment was in practice abolished in Kansas many years before the adoption of formal legislation to that effect in 1907. A similar development took place in Maine in consequence of a law like that of Kansas.

It is a matter of common knowledge that it is exceedingly difficult in many jurisdictions to obtain the conviction of a murderer, even when the proof of his crime is clear. In 1842, Attorney-General Austin of Massachusetts said:

> Whether the punishment of death should be abolished, in any of the few cases to which it is now applied, has been often a subject of legislative inquiry. It does not belong to me to enter upon an argument that is nearly exhausted; but I deem it within my province, in this connection, respectfully to submit to the Legislature an humble opinion, that, in the present state of society, it is no longer an abstract question whether capital punishment is right, but whether it be practicable, and that there is good reason to believe that punishment for crime would more certainly follow the commission, if the Legislature should further abrogate the penalty of death. As the law now stands, in this respect, its efficiency is mostly in its threatenings; but the terror of a trial is diminishing, and the culprit finds his impunity in the severity which it denounces.[1]

In 1846, a joint special committee of which Henry Wilson, afterward Vice-President of the United States, was chairman, said in its report to the Legislature:

[1] *Senate Document No. 58 (1846)*, 8.

While the committee are by no means prepared to admit that capital punishment is no longer "practicable" in this Commonwealth, they do believe that the difficulty in procuring convictions, in the present state of the law, is a serious and an increasing one. The extreme reluctance of persons to appear as witnesses, or to sit as jurors, in cases where their testimony or their verdict may tend to deprive a fellow being of life is too well known to need remark. . . . It may still admit of question how far legislators ought to go in accommodating the laws to such a standard of right.[1]

Writing in 1873, Governor Washburne of Wisconsin, said:

There can be no doubt that the change in the law has made punishment more certain, and I but express the opinion of those who have most carefully considered the question, when I state that but for that change in the law, at least one half of those convicted would have escaped all punishment — so difficult is conviction when the punishment is death.[2]

In 1864, Austin Blair, Governor of Michigan, bore similar testimony in these words:

Before the abolition of the death penalty murders were not unfrequent, but convictions were rarely or never obtained. It became the common belief that no jury could be found (the prisoner availing himself of the common law right of challenge) which would convict. There can be no doubt that public opinion sustains the present law, and is against the restoration of the death penalty. Conviction and punishment are now much more certain than before the change was made.[3]

Similarly, the Chief Justice of Rhode Island, speaking in the light of experience of that State twelve years after the abolition of capital punishment, said:

My observation fully justifies me in saying that conviction for murder is far more certain now in proper cases than when death was the punishment of it.[3]

In 1913, Governor Eberhardt of Minnesota said that while the abolition of capital punishment had not been followed by any decrease in the number of murders, it had resulted in an increase of fifty per cent in the number of convictions.[4]

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[1] *Senate Document No. 58 (1846)*, 19.
[2] Hansard, *Debates*, June 12, 1877, 1679.
[3] Hansard, *Debates*, May 3, 1864, 2098, 2099.
[4] *Proceedings of the American Prison Association, 1913*, 107.

3. Are the effects of the execution of criminals upon the community salutary?

Until within very recent years the execution of prisoners in most countries took place in public. The brutalizing effect of such exhibitions and the total absence of those feelings of solemnity which are naturally associated with the idea of death, and the tendency on the part of many communities to convert these occasions into a sort of holiday, have gradually led to the enactment of laws requiring that such executions shall be private. Many murder cases, however, are of so sensational a nature that the whole atmosphere of the community where they occur becomes saturated with them, and many individuals who are not conscious of any criminal tendencies feel that they are almost in the presence of the crime and that they witness the execution of the criminal. In consequence they experience a feeling of depression and morbidity, which, in the case of a mind having criminal tendencies, might easily result in the commission of crime. The unhealthy influence upon a community of such notorious cases as those of Tucker and Richeson is, of course, incapable of exact determination. Whatever it is, however, it is prolonged over the period which elapses between conviction and execution, and is intensified at the time the death penalty is inflicted. It may be that this is part of the price which society is compelled to pay for its protection against crime. It is certainly one of the facts that should be considered in deciding whether or not capital punishment should be retained.

4. Would the abolition of capital punishment leave society with any adequate protection against those who have already been convicted of murder? Those who argue for abolition answer that life imprisonment affords ample safeguards. This answer would be more convincing if it were not for the widespread abuse of the pardoning power. No criminal is so brutal as to be unable to win a certain amount of maudlin sympathy. Hysterical women send him flowers during his trial and start a campaign for his pardon as soon as he is convicted. The persistent efforts, continued over many years, to win a pardon for Jesse Pomeroy are ample evidence of this abnormal state of mind. The Governor is besieged with petitions in which the

distress of the condemned man's family is emphasized and his regret for his crime is made the basis of a plea for clemency. After a short period of imprisonment the criminal is often discovered to be possessed of an incurable disease, but it would seem that the curative effects of a pardon in cases of an "incurable" ailment would make all pardoning officers suspicious of this plea. In 1905 the Attorney-General of Rhode Island collected data as to all the prisoners sentenced to imprisonment for murder from the opening of the State's Prison in 1838 to 1905. Out of fifty-six murderers, twenty were pardoned after serving an average sentence of eleven years, fifteen and one-half days. There were still twenty in prison who had served an average of nine years, ten months, fourteen and three-tenths days. Of the remaining sixteen, nine died natural deaths, one committed suicide, four became insane and two were unaccounted for. How a sentence to life imprisonment actually works out in Massachusetts may be seen from the fact that in the years 1903 to 1915 the Governor and Council pardoned forty-six prisoners who had been sentenced to life imprisonment. One of these served forty years, nine months and five days. Another served thirty years, five months and ten days. One had served twenty-nine years, ten months and twenty-seven days. On the other hand, five had served less than four years. The average term of the entire forty-six was a little less than fifteen and a half years.

The following tabulation shows the number of pardons granted by the Governor and Council of Massachusetts from January 1, 1903, to January 1, 1916, to persons convicted of a capital offense and sentenced to life imprisonment: —

Year.	Number.	Year.	Number.
1903,	1	1910,	1
1904,	3	1911,	6
1905,	3	1912,	10
1906,	4	1913,	9
1907,	3	1914,	2
1908,	2	1915,	1
1909,	–		

This makes a total of forty-six pardons granted to life prisoners in thirteen years, — an average of 3.53 per year. In only two of these cases did the Governor express any doubt as to the guilt of the prisoner. In one other he expressed doubt as to his mental responsibility.

The probability that a sentence to life imprisonment will mean confinement for only a short term of years has made many legislators hesitate to abandon capital punishment which at least has the merit of permanently ridding the community of the convicted murderer. Because of the gross abuse of the pardoning power the abolition of capital punishment might well be accompanied by a provision that no person sentenced to imprisonment for life should be eligible to a pardon. Of course every prisoner should have the benefit of any newly discovered evidence pointing to his innocence. But such evidence could be submitted to a judicial tribunal for examination, and if it warranted such action the court could reopen the case for such further proceedings as the ends of justice seemed to require.

V. Capital Punishment in Massachusetts.

The question of abolishing capital punishment has long been discussed by the Governor and Legislature of Massachusetts. As far back as 1831, a committee of the House of Representatives, headed by William Sullivan, reported that the crimes of arson, burglary, rape and robbery, which were then capital offenses, ought to be made punishable by imprisonment only. They made the same recommendation with regard to murder, but apparently anticipated that public sentiment would not support them and hence placed the chief emphasis on the desirability of carrying the death sentence into effect in private. None of the committee's recommendations were adopted. In 1835 and 1836 a committee of the House, of which Robert Rantoul of Gloucester was chairman, made elaborate reports in favor of the total abolition of capital punishment. The report of 1836 was especially noteworthy for its keen examination of the Mosaic law. In view of the use still made of this code in the discussion of capital punishment, the following observation of Mr. Rantoul is pertinent:

If any one were to propose to restore the whole Jewish law of homicide, the absurdity would be perfectly apparent; yet, that part which we retain seems no less repugnant to Christian principles than those provisions which we so long ago abandoned.

In 1836 and 1837 committees of the Senate reported in favor of the retention of capital punishment. In 1839 the prolonged agitation against the severity of the penal code which punished six offenses with death resulted in the enactment of legislation which removed burglary and highway robbery from this category, thus leaving only arson, rape, murder and treason subject to the supreme penalty.

In 1846 a joint committee of the two houses again examined the subject with due attention to the Mosaic law, and reported that public sentiment still demanded the death of murderers, but recommended that treason, rape and arson be punishable only by imprisonment. This recommendation was adopted in 1852, and since that time there has been but one capital crime in Massachusetts.

In 1836 Governor Edward Everett, after calling attention to various mitigations in the penal code, said:

A grave question has been started whether it would be safe altogether to abolish the punishment of death. An increasing tenderness for human life is one of the most decided characteristics of the civilization of the day, and should in every proper way be cherished. Whether it can, with safety to the community, be carried so far as to permit the punishment of death to be entirely dispensed with, is a question not yet decided by philanthropists and legislators. It may deserve your consideration whether this interesting question cannot be brought to the test of the sure teacher, — experience. An experiment, instituted and pursued for a sufficient length of time, might settle it on the side of mercy. Such a decision would be matter of cordial congratulation. Should a contrary result ensue, it would probably reconcile the public mind to the continued infliction of capital punishment as a necessary evil.

In 1840, Governor Morton urged the Legislature to consider whether capital punishment might not be immediately abolished for all offenses except murder. He said:

The statistics of crime satisfactorily show that the number of offenses is not increased by the mitigation of punishments; but, on the contrary, that crimes have diminished nearly in proportion to the amelioration of criminal

law. The legitimate object of human punishment is not the expiation of the offense, but the prevention of crime and the security of the community. Any severity beyond what is required for this purpose savors of cruelty, and an unnecessary infliction of pain on our fellow creatures. The severity of criminal laws renders their execution difficult, and thereby defeats the object of them. The certainty rather than the severity of punishment is the surest prevention of crime. The strong sentiment against the punishment of death which pervades the community renders capital convictions almost impracticable and thus frequently enables great offenders to escape merited punishment.

In 1861 and 1862, Governor Andrew in his inaugural addresses strongly reprobated capital punishment and expressed the hope that it would be abolished.

In 1881, Governor Long brought the subject before the Legislature in the following strong language:

I feel it my duty to call your attention to the matter of capital punishment. It is an outrage on human sensibilities; it is out of accord with the spirit of the age; it has undoubtedly, in many cases, induced juries to acquit men who, although really guilty of murder in the first degree, have thus gone unpunished; and nothing can justify it but the conviction which is in the public mind, and which, I admit, affects my own mind very differently the moment I look at the matter under a sense of official responsibility, that the dread of this extreme penalty is a safeguard to life. If, however, a change in the law were found to be attended with an increase of capital crime, the present penalty could be restored at any subsequent session of the Legislature. It has occurred to me, and I suggest to you, that some of the objections on either side might be met by providing that whenever a person is found guilty of murder in the first degree, and the jury, in rendering the verdict, recommend him to mercy, the penalty shall be imprisonment for life, and, if you had the power, I should add, without hope of pardon except as the court might find ground to grant a new trial. Under such a law, the fear of capital punishment would still stare the murderer in the face; juries would not be deterred from finding guilt in cases in which they would hesitate to find it if its punishment were sure to be death; the one tribunal, which, above all others reflects the sentiment of the community, would have the determination of the matter in its hands; and finally, I am frank to say, I think it would tend to put hanging out of fashion, even while it preserved the terror of the death penalty. For, if capital punishment is to be inflicted, some less revolting, less demoralizing, and more scientific method of inflicting it than that of hanging ought to be adopted.[1]

[1] *Senate Document No. 1 (1881)*, 50.

In accordance with this recommendation a bill was introduced which provided that in cases of conviction of murder in the first degree the punishment should be life imprisonment if the jury "return a unanimous request therefor with the verdict." In the Senate the bill was ordered to a third reading by a vote of 16 to 13, but was refused passage to engrossment by a vote of 11 to 17.

The next year Governor Long renewed his recommendation and used these words:

> I renew my protest against the barbarism, inefficiency, and peril to innocence, of capital punishment. Failing its abolition, I earnestly urge you to leave to the jury — the best and safest of tribunals — the question of its infliction. This will make conviction surer, will meet more fully the circumstances of each case, and, while still preserving the terror of the death penalty, if there be any virtue in that, will be more in harmony with the humane spirit of the age. The pretence of insanity will not then succeed, as it now too often does. Should you abolish the death penalty, you might substitute for it the severest form of imprisonment. Let me remind you, quoting the substance of another's summarization, first, that the present uncertainty of the death verdict lessens the deterrence of the death penalty; second, that, with its abolition for smaller offences, their number, in proportion to the increase of population and the facilities for their commission, has diminished; and third, that in civilized communities, where it has been totally abolished, murders have not become more frequent. Rhode Island is an instance. Statistics show also that the pardoning power is not abused in relation to sentences for murder in the first degree when commuted from death to imprisonment for life.[1]

An adverse report on this recommendation was accepted in each house without a division.

In 1900, Hosea M. Knowlton, Attorney-General of Massachusetts, who had had an unusually wide experience as prosecuting officer in capital cases, referred to the subject of capital punishment in these words:

> I was led to recommend that the death sentence of Edwin Ray Snow, the seventeen-year-old murderer, whose case is reported above, be commuted to imprisonment for life, not because of the previous good character of the prisoner, nor because there were any mitigating circumstances in the homicide itself, but rather because I did not believe that public sentiment in Massachusetts would tolerate the execution of a boy of this age,

[1] *Senate Document No. 1 (1882)*, 32.

whatever his previous character and however grave the crime he had committed. The Council were unanimous in acting upon my recommendation, and, so far as I can learn, the sentiment of the people of the Commonwealth is in full accord with the result.

If it be true that the execution of a boy of seventeen years would not be tolerated by the community, it is worthy of consideration whether the law, which, as it stands, requires prosecuting officers to ask for and the courts to impose sentence of death upon all persons, of whatever age, convicted of murder in the first degree, should not be amended, so that it may conform to the existing sentiment of the community.

While the reasons for also amending the law as to women stand upon different considerations, and are mostly sentimental in their nature, it is nevertheless a fact that no woman has suffered the penalty of death in Massachusetts for many years, and, so far as I can learn, during the present century. I doubt very much whether a case could occur where the Executive would not commute a death sentence against a woman.

It is far from probable that the people of Massachusetts would at present favor the total abolition of capital punishment, although there are many whose views go to that extent; but as to women, and minors under the age of eighteen, I do not hesitate to recommend that the law requiring the punishment of death be amended, so that, upon conviction of murder in the first degree, such persons shall be sentenced to imprisonment for life.[1]

In 1901, Attorney-General Knowlton reverted to his previous recommendation and said:

In my report of last year I recommended the abolition of the death penalty as to females and minors under the age of eighteen years. Without acting upon my recommendation, a bill was reported by the Committee on the Judiciary entirely abolishing capital punishment. After full discussion, it failed to pass the House by the remarkably narrow margin (including pairs) of 103 members in favor of the bill and 105 against it. A vote so close can scarcely be said definitely to have settled the question, and it is not unlikely that the discussion may be renewed in the present Legislature.

I was subjected to some criticism for not following out the logic of my convictions, by recommending not a partial but a total abolition of the death penalty. I am disposed to regard the criticism as just; but I was restrained for the reason, as stated in my report, that I did not deem it probable that the sentiment of the people of Massachusetts was at that time in favor of the total abolition of capital punishment.

The vote above referred to, however, has led me to believe that a proposition to abolish the death penalty cannot at the present time properly be regarded as a radical shock to the sense of the community, nor as pre-

[1] *Report of the Attorney-General, 1900*, xv.

mature and therefore ill-advised. I think it proper and timely, therefore, to contribute my views to the discussion, — views based not only upon a close observation of the operation of the existing laws in this as well as in other States, but also upon an experience in the prosecution and trial of capital cases, which, possibly, may be more extensive than that of any other man now living in the State.

My views, briefly stated, are: that the punishment of murder by death does not tend to diminish or prevent that crime; that a man who is so far lost to reason as to conceive the commission of murder with deliberate and premeditated malice aforethought does not enter into a discussion with himself of the consequences of this crime; that the infliction of the death penalty is not in accord with the present advance of civilization; and that it is a relic of barbarism, which the community must surely outgrow, as it has already outgrown the rack, the whipping-post and the stake.

I think I am justified in saying that the majority of those who have been or are engaged in the trial of capital cases share in these views.[1]

In 1907, Senator James H. Vahey introduced a bill into the Senate by which the jury in a capital case was authorized to qualify its verdict of guilty by adding the words "without capital punishment." This bill was adversely reported, but was substituted for the committee's report by a vote of 20 to 7. It finally passed the Senate by a vote of 20 to 17, but was rejected by the House by a vote of 92 to 93.

In 1916, while a measure for the abolition of capital punishment was pending before the Legislature, Governor McCall addressed the two houses in a special message in which he briefly rehearsed the history of the gradual abandonment of capital punishment and concluded by saying:

> As statistics do not prove that the infliction of capital punishment lessens the number of crimes committed, it would seem that the time had arrived for doing away with that method of punishment. I therefore recommend that you take action accordingly.

The Governor's recommendation was overwhelmingly defeated in both houses.

In 1917, Governor McCall returned to the subject and said in his inaugural address:

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[1] *Report of the Attorney-General, 1901*, xviii.

I urge you to pass legislation abolishing capital punishment. I believe that the principles of humanity and the scientific methods of penology both demand that it be done away with, and that the experience of the States and nations which have abolished it warrant us in taking the same action.

On measures introduced to carry out this recommendation, the joint committee on the judiciary reported "leave to withdraw."

Appendix A.

Present Penalties for Homicide and Other Serious Crimes (except Treason) in the Several States and Territories.

[The States printed in italics abolished capital punishment in the years indicated.]

States.	Murder in First Degree.	Murder in Second Degree.	Robbery.	Rape.	Arson in First Degree.	Burglary in First Degree.
Alabama,	Death or life imprisonment.	– –	Death or 10 years up.	Death or 10 years up.	Death or 10 years up.	– –
Arizona (1916),	Life imprisonment.	– –	– –	– –	– –	– –
Arkansas,	Death.	– –	– –	Death.	– –	– –
California,	Death or life imprisonment.	– –	– –	– –	– –	– –
Colorado,	Death or life imprisonment.	– –	– –	– –	– –	– –
Connecticut,	Death.	– –	– –	– –	– –	– –
Delaware,	Death.	– –	– –	Death.	Death.	Death.
Florida,	Death.	– –	– –	Death or life imprisonment.	– –	– –
Georgia,	Death.	– –	– –	Death.	– –	– –
Idaho,	Death or life imprisonment.	– –	– –	– –	– –	– –
Illinois,	Death or 14 years to life.	Death or 14 years to life.	– –	– –	– –	– –
Indiana,	Death or life imprisonment.	– –	– –	– –	– –	– –

PRESENT PENALTIES FOR HOMICIDE AND OTHER SERIOUS CRIMES (EXCEPT TREASON) IN THE SEVERAL STATES AND TERRITORIES — *Continued.*

[The States printed in italics abolished capital punishment in the years indicated.]

STATES.	Murder in First Degree.	Murder in Second Degree.	Robbery.	Rape.	Arson in First Degree.	Burglary in First Degree.
Iowa,	Death or life imprisonment.	– –	– –	– –	– –	– –
Kansas (1907),	Life imprisonment.	– –	– –	– –	– –	– –
Kentucky,	Death or life imprisonment.	Death or life imprisonment.	– –	Death or life imprisonment.	– –	– –
Louisiana, [1]	Death.	Death or life imprisonment.	– –	Death.	Death or 1 to 20 years. [2]	Death or not over 14 years. [3]
Maine [4] (1887),	Life imprisonment.	– –	– –	– –	– –	– –
Maryland,	Death or life imprisonment.	– –	– –	Death or 1½ to 21 years.	Death or not over 20 years.	– –
Massachusetts,	Death.	– –	– –	– –	– –	– –
Michigan (1846),	Life imprisonment.	– –	– –	– –	– –	– –
Minnesota (1911),	Life imprisonment.	– –	– –	– –	– –	– –
Mississippi,	Death or life imprisonment.	Death or life imprisonment.	– –	Death or life imprisonment.	Death or life imprisonment.	– –
Missouri,	Death or life imprisonment.	– –	– –	Death or 5 years up.	– –	– –
Montana,	Death or life imprisonment.	– –	– –	– –	– –	– –
Nebraska,	Death.	– –	– –	– –	– –	– –
Nevada,	Death or life imprisonment.	– –	– –	– –	– –	– –

New Hampshire, .	Death or life imprisonment.	–	–	–	–	–	–	–	–	–	–
New Jersey, . .	Death.	–	–	–	–	–	–	–	–	–	–
New Mexico, . .	Death.	–	–	–	–	–	–	–	–	–	–
New York, . .	Death.	–	–	–	–	–	–	–	–	–	–
North Carolina, .	Death.	–	–	–	–	Death.		Death.		Death.	
North Dakota [5] (1915),	Life imprisonment.	–	–	–	–	–	–	–	–	–	–
Ohio, . . .	Death or life imprisonment.	–	–	–	–	–	–	–	–	–	–
Oklahoma, . .	Death or life imprisonment.	–	–	–	–	Death or 15 years up.		–	–	–	–
Oregon (1914), . .	Life imprisonment.	–	–	–	–	–	–	–	–	–	–
Pennsylvania, . .	Death.	–	–	–	–	–	–	–	–	–	–
Rhode Island [5] (1852),	Life imprisonment.	–	–	–	–	–	–	–	–	–	–
South Carolina, .	Death or life imprisonment.	–	–	–	–	Death or 5 to 40 years.		Death.		–	–
South Dakota (1915),	Life imprisonment.	–	–	–	–	–	–	–	–	–	–
Tennessee, [6] . .	Life imprisonment.	–	–	–	–	Death or 10 years up.		–	–	–	–
Texas, . . .	Death or 5 years up.	–	–	–	–	Death or over 5 years.		–	–	–	–

[1] Louisiana has death penalty for kidnapping also.

[2] Arson where people live, death penalty; other structures, imprisonment for period of years.

[3] Burglary when armed, death penalty; otherwise, imprisonment for period of years.

[4] Maine abolished capital punishment in 1875, reinstated it in 1883, and again abolished it in 1887.

[5] Since 1882 Rhode Island has had the death penalty for murder committed within prisons, and North Dakota prescribes the death penalty for murder committed by one serving a life sentence.

[6] Tennessee has no death penalty except for rape and for offenses committed by a life convict if such offense was previously punishable by death.

PRESENT PENALTIES FOR HOMICIDE AND OTHER SERIOUS CRIMES (EXCEPT TREASON) IN THE SEVERAL STATES AND TERRITORIES — *Concluded.*

[The States printed in italics abolished capital punishment in the years indicated.]

STATES.	Murder in First Degree.	Murder in Second Degree.	Robbery.	Rape.	Arson in First Degree.	Burglary in First Degree.
Utah,	Death or life imprisonment.	–	–	–	–	–
Vermont,[1]	Death.	–	–	–	Death or up to life.	–
Virginia,	Death or life imprisonment.	–	Death or 5 to 18 years.	Death or 5 to 20 years.	Death.	Death or 5 to 18 years.
Washington (1913),	Life imprisonment.	–	–	–	–	–
West Virginia,	Death or life imprisonment.	–	–	Death or 7 to 20 years.	–	–
Wisconsin (1853),	Life imprisonment.	–	–	–	–	–
Wyoming,	Death or life imprisonment.	–	–	–	–	–
Alaska,	Death or life imprisonment.	–	–	–	–	–
Dist. of Columbia,	Death.	–	–	Death or 5 to 30 years.	–	–
Hawaii,	Death.	–	–	–	Death or life imprisonment.	–
Porto Rico,	Death or life imprisonment.	–	–	–	–	–

[1] Vermont in 1910 passed a law making death or life imprisonment the punishment for murder, but in 1912 returned to the death penalty only (see page 36).

Appendix B.

Prisoners under Conviction of Homicide who were serving Sentence or awaiting Execution in 1904 and 1910.

This table was compiled from the Special Census Report, *Prisoners and Juvenile Delinquents in Institutions, 1904* (1907), and from Census Bulletin No. 121, *Prisoners and Juvenile Delinquents, 1910* (1914). Official figures for later years are not yet available.

State.	Number per 100,000 of Population.		State.	Number per 100,000 of Population.	
	1904.	1910.		1904.	1910.
Arizona,	59	34	Delaware,	8	8
Nevada,	50	34	Virginia,	13.5	1.5
Florida,	52	41	Illinois,	9	6
New Mexico,	42	23	Oregon,	10	5
Montana,	35	26	North Dakota,	9	5
Louisiana,	36	24	Indiana,	7	7
Georgia,[1]	33	27	South Dakota,	7	5
Alabama,	32	26	*Michigan* (1846),	7	5
Wyoming,	39	13	Ohio,	7	4
Texas,	29	14	Maryland,	10	1
South Carolina,	24	20	Utah,	6	5
Mississippi,	27	11	Vermont,	4	7
Kentucky,	25	12	*Wisconsin* (1853),	6	4
California,	25	11	Minnesota,	5	5
West Virginia,	25	11	*Maine* (1887),	6	4
Kansas (1907)[1]	30	6	New Jersey,	6	3
Colorado,	23	13	Iowa,	5	4
Missouri,	10	16	New Hampshire,	5	3
Tennessee,	18	6	Nebraska,	5	3
Idaho,	17	7	*Rhode Island* (1852),	5	3
Arkansas,	14	8	New York,	6	.47
North Carolina,	13	5	Pennsylvania,	6	1
Washington,[1]	14	3	Massachusetts,	4	2
Connecticut,	8	8			

[1] Federal prisons are located in Georgia, Kansas and Washington and affect the value of the statistics for these States because the Federal prisoners are included in the Census Report.

Appendix C.

The Oregon Constitutional Amendment of 1914.

Article I of the Constitution of the State of Oregon shall be and hereby is amended by the addition of a Section to said Article I, and it shall be designated as Section 36 of Article I.

Section 36. The death penalty shall not be inflicted upon any person under the laws of Oregon. The maximum punishment which may be inflicted shall be life imprisonment.

All the provisions of the Constitution and laws of Oregon in conflict with this section are hereby abrogated and repealed in so far as they conflict herewith, and this section is self-executing.

Note. — The foregoing amendment was proposed by initiative petition and approved November 3, 1914, by a vote of 100,552 to 100,395. It became effective December 3, 1914.

Appendix D.

Statutory Provisions abolishing Capital Punishment.

1. *Michigan.*

Section 1. All murder which shall be perpetrated by means of poison or lying in wait, or any other kind of willful, deliberate, and premeditated killing or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished by solitary confinement at hard labor in the State prison for life. — *Revised Statutes, 1846*, Chap. 153.

2. *Rhode Island.*

Section 1. The punishment of death is hereby abolished.

Section 2. Any person convicted of any crime punishable by death by the laws now in force in this State, shall be confined in the State prison, at hard labor, for the period of his or her natural life.

Section 3. On the conviction of any person for a crime now punishable by law with death, he or she shall thereupon with respect to all rights of property, to the bond of matrimony and all civil rights and relations of whatever nature be deemed to be dead in all rights, as if his or her natural death had taken place at the time of such conviction.

Section 4. Hereafter no person convicted of any crime now punishable with death, or other crime for which the punishment is now by law imprisonment for a term of not less than five years, shall be pardoned or released from prison, except by a concurrent recorded vote of three-fourths of all the members elected to each house of the General Assembly, and approved by the Governor. And all challenges to jurors except for cause, in the trial of any criminal case, are hereby abolished. So much of any act as is inconsistent herewith is repealed. — *General Laws, 1852*, p. 12.

3. *Wisconsin.*

Section 1. In all convictions under the statutes of this State, for the crime of murder in the first degree, the penalty shall be imprisonment in the State prison during the life of the person so convicted; and the punishment of death for such offense, is hereby abolished.

Section 2. All acts and parts of acts, contravening the provisions of this act, are hereby repealed. — *General Laws, 1853*, Chap. 103.

4. *Maine.*

Sect. 1. Section 2 of Chapter 118 of the Revised Statutes is hereby amended, so as to read as follows:

"*Sect. 2.* When murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable by imprisonment for life, or for an unlimited term of years, it shall be deemed murder in the first degree and punished by imprisonment at hard labor for life." — *Public Acts, 1887*, Chap. 133.

5. *Kansas.*

Section 1. That Section 8, Article 2 of Chap. 31 of the General Statutes of 1901, be amended so as to read as follows: —

Section 8. Persons convicted of murder in the first degree shall be punished by confinement and hard labor in the penitentiary of the State of Kansas for life. Those convicted of murder in the second degree shall be punished by confinement and hard labor for not less than ten years. — *Laws, 1907*, Chap. 188.

6. *Minnesota.*

Section 1. That section 4876 of the Revised Laws of 1905 be and the same is hereby amended so as to read as follows: —

Section 4876. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when perpetrated with a premeditated design to effect the death of the person killed or of another, and shall be punishable by imprisonment for life in the State prison. — *General Laws, 1911*, Chap. 387.

7. *Washington.*

Sect. 1. That Section 2392 of Remington and Ballinger's Annotated Code and Statutes of Washington be amended to read as follows: —

Section 2392. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either —

1. With a premeditated design to effect the death of the person killed, or of another, or

2. By an act imminently dangerous to others and evincing a depraved mind regardless of human life, without a premeditated design to effect the death of the individual, or

3. Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree, or

4. By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway or any engine, motor or car of such railway.

Murder in the first degree shall be punishable by imprisonment in the State penitentiary for life. — *Session Laws, 1913*, Chap. 167.

8. *South Dakota.*

Be it enacted by the Legislature of the State of South Dakota:

SECTION 1. That section 253 of the *Penal Code* of the State of South Dakota be amended to read as follows: —

Section 253: Every person convicted of murder shall be sentenced to hard labor in the State penitentiary, for life, and the judgment of the court shall be in accordance therewith. — *Session laws, 1915*, Chap. 158.

9. *North Dakota.*

SECT. 1. *Punishment for murder in the first degree.* Every person who has been or may be convicted for murder in the first degree shall be punished by confinement at hard labor in the State Penitentiary for life. —

Provided, That if a person shall be convicted for murder in the first degree while under such life sentence, he may be punished by death.

SECT. 2. *Persons convicted and under sentence of murder in the first degree, when subject to pardon.* No person hereafter convicted of murder in the first degree shall be eligible to pardon until after he shall have been confined in the State Penitentiary for at least 50 per cent of the time of his life expectancy, to be determined on the day and date of his age on the date of entry of final judgment of conviction and such life expectancy shall be based on the life expectancy tables known as the Carlisle tables of mortality, or unless it shall be made to appear to the satisfaction of the Pardon Board that the person convicted is innocent of the charge for which he was convicted.

SECT. 3. *Repeal.* Section 9472 of the Compiled Laws of 1913 for the State of North Dakota is hereby repealed.

SECT. 4. *Emergency.* An emergency is hereby declared to exist and this act shall take effect and be in force from and after its passage and approval. — *Session Laws, 1915*, Chap. 63.

10. *Arizona.*

Be it enacted by the people of the State of Arizona:

SECTION 1. That Paragraph 173, Chapter 1, Title VIII, Penal Code, of the Revised Statutes of Arizona, 1913, be and the same is hereby amended so as to read as follows:

"173. Every person guilty of murder in the first degree shall suffer imprisonment for life, and every person guilty of murder in the second degree shall be confined in the State Prison for not less than ten years. No person convicted of the crime of murder shall be recommended for pardon, commutation or parole by the Board of Pardons and Paroles, except upon newly discovered evidence establishing to the satisfaction of all the members of said Board his or her innocence of the crime for which conviction was secured."

SECTION 2. All acts and parts of acts in conflict with this act are hereby repealed. — Initiative Measure, adopted in 1916. *Session Laws of 1917*, Appendix, 4.

Appendix E.

The Vermont Statutes abolishing and subsequently restoring Capital Punishment.

An Act in Amendment of Section 5695 of the Public Statutes relating to Homicide.

Section 1. Section 5695 of the public statutes is hereby amended so as to read as follows:

Section 5695. The punishment of murder in the first degree shall be death or imprisonment for life in State's prison as the jury may determine; and the punishment of murder in the second degree shall be imprisonment in State's prison for life or for such term as the court pronouncing sentence may fix. If the jury shall find the respondent guilty of murder in the first degree, the punishment shall be life imprisonment in State's prison unless the jury shall add to their verdict the words, "with capital punishment."

Section 2. This act shall not apply to proceedings or prosecutions heretofore commenced or now pending or to penalties heretofore incurred under Section 5695 of the public statutes hereby amended or to murders heretofore committed and said section is hereby continued in full force and effect as to all such proceedings, prosecutions, penalties and murders.

Section 3. This act shall take effect from February 1, 1911. — *Session Laws, 1910,* Act No. 225.

An Act to amend Section 5695 of the Public Statutes, as amended by Section 1 of No. 225 of the Acts of 1910, relating to the Punishment for Murder.

Section 1. Section 5695 of the public statutes, as amended by Section 1 of No. 225 of the Acts of 1910 is hereby amended so as to read as follows:

Section 5695. The punishment of murder in the first degree shall be death, and the punishment of murder in the second degree shall be imprisonment in State's prison for life.

Section 2. This act shall not apply to proceedings or prosecutions heretofore commenced or now pending, or to penalties heretofore incurred under Section 5695 of the public statutes as amended by Section 1 of No. 225 of the Acts of 1910, or to murders committed after January 27, 1911 and before the time when this act takes effect, and said section as so amended, is hereby continued in full force and effect as to all such proceedings, prosecutions, penalties and murders. — *Session Laws, 1912,* Act No. 228.

Appendix F.

Amendments proposed in the New York Constitutional Convention of 1915, and the Minority Report thereon.

Proposed Constitutional Amendment No. 677.

To amend Article One of the Constitution by providing for the Abolition of Capital Punishment.

To amend article one of the Constitution by adding immediately after section 6 thereof, a new section to be designated section 7 and subsequent sections to conform thereto, as follows: —

Section 7. Capital punishment shall be forever abolished in this State and punishment by imprisonment substituted therefor.

Proposed Contitutional Amendment No. 24.

To amend Section Five of Article One of the Constitution.

Section 5. Excessive bail shall not be required nor excessive fines imposed, nor shall [the death penalty or any] cruel and unusual punishment[s] be inflicted, nor shall witnesses be unreasonably detained.

[The material constituting the proposed amendment is enclosed in brackets.]

Proposed Constitutional Amendment No. 816.

To amend Section Five of Article One of the Constitution.

Section 5. Excessive bail shall not be required nor excessive fines imposed nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained. [On a conviction for a crime now punishable by death, the jury may by its verdict impose either the death penalty or life imprisonment and in the latter event no pardon or commutation shall be granted unless the innocence of the person convicted be established.]

Proposed Constitutional Amendment No. 816, the new matter in which is enclosed in brackets, was reported favorably to the Convention by a majority of the Committee on Bill of Rights, but the recommendation of the Committee was not accepted by the Convention.

Minority Report of the Committee on Bill of Rights relative to Proposed Amendment to Article I, Section 5.

SEPTEMBER 1, 1915.

The undersigned, members of the Committee on Bill of Rights, respectfully submit the following minority report of the amendment proposed by that Committee to Article one, Section five, which proposed amendment reads as follows: "On conviction for a crime now punishable by death, the jury may by its verdict impose either the death penalty or life imprisonment and, in the latter event, no pardon or commutation shall be granted unless the innocence of the person convicted shall be established." In our opinion, no change should be made in the Constitution on this subject for the following reasons among others:

(1) The matter is purely legislative and not constitutional. If the proposed amendment were placed in our fundamental law for the next twenty years and found to be detrimental to the people of the State, it would become a great calamity. The States of this country have not generally dealt with this subject in their constitutions.

(2) There is no apparent demand for such a change. The general feeling, as we understand it, is that the administration of the criminal law should be strengthened wherever possible and not weakened by provisions which might encourage crime.

(3) The proposed amendment involves a rule of men and not of law. It would not be fair to juries to place upon them a responsibility which fairly and logically belongs to the State. The jury should determine the guilt, but the State by its law should fix the punishment. The reverse of this will cause discord in the jury room and lead to many disagreements that would not otherwise occur and will cause a lack of uniformity in punishment.

(4) The proposed amendment is, in effect, an attempt to abolish capital punishment; for few, if any, juries will inflict the death penalty if they can avoid the responsibility.

(5) The City of Greater New York, with its varied and rapidly changing population, is the last place in the world in which to try such an experiment.

(6) We believe that a certain death penalty is the greatest deterrent against murder and that it is the duty of this Convention to conserve the safety of those who otherwise might be victims of that crime. If the retention of the death penalty will cause the murders in this State to be any less in number than they otherwise would be it should be retained. The practically unanimous testimony of those charged with the administration of the criminal law is that, in their opinion, this retention would have that effect.

Appendix G.

Report of the Committee on the Amendment of the Law of the Association of the Bar of the City of New York, 1917.

The Committee on the Amendment of the Law of the Association of the Bar of the City of New York has recently reported favorably upon four bills introduced into the New York Legislature to amend the penal law in relation to punishment for murder in the first degree.[1] The report is as follows: —

"The Committee approves these bills. They provide that the punishment to be inflicted upon a conviction for murder in the first degree shall be either death or imprisonment for life, the alternative to be prescribed by the jury in its verdict.

"The question of abolishing capital punishment or modifying the present law in the manner described was reserved for full discussion when all members of the committee were present. By a vote of six to three the modification created by these bills was approved. Conferences with judges and others connected with the administration of the criminal law reveal a conviction on the part of many of them that capital punishment is a deterrent in many cases, notwithstanding repeated assertions to the contrary. It was pointed out that, whereas the degree of punishment wholly unaffects one who commits murder in the heat of passion, on the other hand, the fear of the extreme penalty of the law is a factor which is considered by those who would commit murder in cold blood. It is feared by some public officials that the abolition of the death penalty would increase the class of hired assassins. At the same time, it is recognized that there should be some mitigation of the extreme penalty and that this mitigation ought to be provided in the form of alternative penalties for murder in the first degree. This should not be brought about, as at present, by a verdict of murder in the second degree, when perhaps, under the law and the evidence, the defendant is clearly guilty of murder in the first degree. The Committee gave much weight to the fact that juries in many cases wish to spare a defendant's life and, to do so, find him guilty of murder in the second degree whereas, on the evidence, the crime is frequently one of the higher degree. The punishment for murder in the second degree, however, under the rule of imposing an indeterminate sentence, amounts to imprisonment for a minimum term of twenty years and the maximum term of the natural life of the defendant. Under commutation laws, even the twenty years' term is reduced, so that it may well happen that a defendant whose life a jury may

[1] Senate Bill, No. 376, Int. No. 361. Assembly Bill, No. 438, Int. No. 419. Assembly Bill, No. 428, Int. No. 412. Assembly Bill, Pr. No. 624, Int. No. 586.

seek to spare, and whom it may desire to keep confined for the rest of his life, may complete his sentence in less than twenty years.

"The Committee believes there should be some intermediate alternative. This alternative the present bills provide. The circumstances of each case and the character of the accused will all enter into the determination of the jury in fixing the punishment either at death or life imprisonment. If the case calls for still lighter punishment, the jury is at liberty to find the defendant guilty of murder in the second degree or manslaughter in one of its degrees. At all events, under the proposed plan, punishment for murder will be more certain and in conformity with fact and law, and the death penalty will only be inflicted for really heinous murders, which call for exemplary and condign punishment." — *The Association of the Bar of the City of New York* (Bulletin No. 6), 1917.

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BULLETIN No. 26

THE RECALL OF OFFICERS

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THE RECALL OF OFFICERS.

Introduction.

The recall is a process by which a public officer, whose service is unsatisfactory to those by whom he was elected, may be removed from office by them before the expiration of his term.

Neither the name "recall" nor the process is new in American constitutional law. There still stands unrepealed in the Constitution of this Commonwealth the provision placed therein in 1780, that the delegates of this Commonwealth to the Congress of the United States "may be recalled at any time within the year, and others chosen and commissioned . . . in their stead." (Chapter IV.) No record of the exercise of this power by the Massachusetts Senate and House of Representatives has been noted, and the provision of course became of no effect upon the adoption of the present Constitution of the United States. It was practically copied from the Articles of Confederation which provided (Article V.) that delegates be annually appointed "in such manner as the legislature of each State shall direct, to meet in Congress, . . . with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year." In the Constitutional Convention of 1787 the recall was doubtless seriously considered; and Luther Martin (in his "Genuine Information" to the Maryland Legislature) protested that under the proposed Constitution, however serious the senators' or representatives' offences, "their States can not recall them, nor exercise any control over them."

Both the Continental Congress and the Congress under the Confederation appeared to the people of their day as assemblies of diplomatic representatives rather than as legislatures, and the recall of the agents appointed by the States to sit therein

seemed as natural as does the recall of an ambassador or envoy at the present time. As an instrument of "progressive" democracy, the recall in America has a history of less than fifteen years. It was first introduced in the charter of Los Angeles, California, which — after vigorous opposition in the Legislature

The State-wide Recall of Officers.

Year.	State.	Applies to Whom?	Signatures Required for Recall Petition.
1908	Oregon, ...	Every elective public officer of the State.	25 per cent of those who voted for Justice of Supreme Court.
1911	California, . . .	Every elective public officer of the State.	12 per cent of vote cast for office of the incumbent. 20 per cent for a subdivision. 25 per cent in local recalls.
1912	Arizona, . . .	Every elective officer holding an elective office either by election or appointment.	25 per cent of vote cast for office of the incumbent.
		"Advisory Recall" for Senators and Representatives in Congress and for U. S. District Judge in Arizona.	15 per cent in general election; 25 per cent in special election.
1912	Idaho, ...	Every elective public officer of the State, county, district or municipality, except judges.	25 per cent of aggregate vote for Justice of Supreme Court.
1912	Colorado, . . .	Every elective public officer, and judicial decisions.	25 per cent of vote cast for office of the incumbent.
1912	Nevada, . . .	Every elective public officer of the State.	25 per cent. (Inoperative, as Legislature has not passed necessary statute.)
1912	Washington, . .	Any elective officer except judges of courts of record.	25 per cent of vote for incumbent's office; but 35 per cent in case of judges, members of legislature, and certain specified classes of city and county officers.
1913	Michigan, . . .	All elective officers except judges of courts of record and courts of like jurisdiction.	25 per cent of aggregate vote cast for Governor.
1914	Kansas, . . .	Every public officer holding office either by election or appointment.	10 per cent of electors of the State; 15 per cent for officers of units less than State and greater than county; 25 per cent for others.
1914	Louisiana, . . .	Any State officer except judges and justices of the peace.	25 per cent.

In 1912 the voters of Arkansas by a majority of over 13,000 gave their approval to a constitutional amendment providing for the recall on the Oregon model; but the action was declared void by the Supreme Court of the State, on the ground that the constitution permitted the submission of but three amendments, in the order of their proposal, at one election, and as three others had been filed before this, the vote on this was of no effect.

because of this very feature — was finally adopted in 1903.[1] Yet this startling novelty, as it was then regarded, had been in use for many years in several of the Swiss cantons, and the provisions of the Los Angeles charter bear a striking resem-

[1] *Laws of California, 1903*, 574–575.

blance to those which had been long operative in Schaffhausen, but were not suggested by them.[1]

The first introduction of the state-wide recall was by Oregon, in 1908. Since that time, nine other States have made constitutional provision for this method of removing officers, though in Idaho the amendment remains inoperative, since the Legislature has neglected to enact the statute necessary to put it into effect.

The Objects of the Recall.

The objects of the recall are obvious. The first, as phrased in the Louisiana statute, is "to furnish a quick and sure means by which an officer, elected by the people, may be removed by the people, without intervention of the courts and without delay." It is clear that the extent to which the recall is needed in order to achieve this object is dependent in some degree upon the length of the officers' terms, and the other processes for removal which the recall merely supplements.

A second object put forward by advocates of the recall is that it may "aid the office-holder in retaining a candidate's frame of mind," by making not merely his election to the office but his retaining it dependent upon his constantly meriting it — in the opinion of his constituents. While in many cases the recall keeps an office-holder's memory exceptionally alert as to his pre-election policies and pledges, it must be acknowledged that in some other respects the permanently candidatial frame of mind promises less satisfactory effects upon his conduct in office.

How the Recall is Invoked.

The recall is a first cousin to the initiative and referendum, and the process by which it is invoked is by petition, subject to the same safeguards that have been applied to the petitions in use in the "people's law-making." (See Bulletin No. 6, *The Initiative and Referendum.*)

The Recall Petition.

The form of the recall petition is elaborately prescribed by law, and in some States the blanks are supplied by authority, after due application has been made.

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[1] W. E. Rappard, "The Initiative, Referendum and Recall in Switzerland," in *Annals of the American Academy of Political and Social Science*, XLIII, 127. (September, 1912.)

Number of Signatures Required.

No State has as yet specified a minimum number of signatures which must be secured in order to make a petition valid or "sufficient." The requirement has always been stated as a certain percentage of the voters, and in eight out of the ten States the accepted percentage for the state-wide recall is twenty-five. In California and Kansas the percentage is much lower, — twelve and ten, respectively.

Three different practices obtain as to the basis upon which the percentage shall be reckoned. Thus, in Kansas it is based upon the number of qualified electors of the State. In Oregon and Idaho the requirement is twenty-five per cent of the number of votes cast for all candidates for Justice of the Supreme Court at the last preceding election. In Michigan the number of votes cast for gubernatorial candidates is taken as the basis. On the other hand, four States reckon the percentage upon the entire vote cast at the preceding election for candidates for the office held by the incumbent whose removal the petition-signers wish to bring about. This last method of gauging the percentage is the most logical of the three; but it may often represent a materially less widespread demand. Two of the States insist that the signers be distributed through a considerable proportion of the counties of the State, thus preventing the forcing of the issue because of an officer's unpopularity in some small section. California, for instance, requires that petitions must be signed by one per cent of the vote in at least five counties.

What the Petition Contains.

The phrasing of the petitions differs. In some States, *e.g.*, Louisiana, a communication is addressed to the Governor, in which the signers "hereby petition your Excellency to call a special election . . . for the purpose of permitting the qualified electors . . . to vote upon the question of recalling —— —— from his office, and for the further purpose of electing a successor to said office, in case he is recalled." In contrast with this is Arizona's blunt formula: "Sir: — We, the qualified electors of the electoral district from which —— —— was elected, demand his recall."

It is next generally required that there be set forth, in not more than two hundred words, the ground or grounds on which the recall is sought. Colorado writes into her statute that the electors alone shall be the judges of the validity and sufficiency of these grounds; they shall not be reviewable elsewhere. As to the sufficiency of the petition, the Louisiana Constitution constitutes the Secretary of State, State Treasurer and State Auditor a board whose findings as to that matter are final.

When may a Petition be Filed against an Officer?

In order that the recall petition may not be "sprung upon" an official before he has had an opportunity to prove his effectiveness in service, and in order that the petition may not reflect merely the resentment of a defeated candidate's adherents, it is the usual provision that no recall petition shall be filed against a State official until he has held his office six months. Exception is made of a member of the Legislature, in whose case the time limit is five or ten days from the beginning of the first session of the Legislature to which he has been elected.

Courses Open to the Challenged Officer.

In each State in which the recall has been introduced, the law provides that the officer with whom the petition is filed shall give the challenged official prompt notice that such action against him has been taken, together with the information that it is his privilege to file a statement of not more than two hundred words (three hundred in California) in justification of his course in office. This statement is to be published, and to be printed upon the election ballot, together with the petitioners' charges against him. In Arizona the right to have such a justification printed on the ballot is deemed to be waived by the officer unless he delivers it within ten days of receiving notice of the filing of the recall petition.

It is ordinarily provided that if, within five days of the receipt of notice that the recall has been initiated, the challenged official resigns, his resignation shall be accepted, and the vacancy thus caused shall be filled as provided by law.

The Recall Election.

In case the challenged incumbent does not resign, under pressure of the recall petition, within the specified time, an election is called, to take place within from twenty to eighty days, to determine the issue. In some city charters it is provided that there shall be no recall election within three months prior to the expiration of the officer's term; in some others discretion is granted to the council to refuse to call a special election, if a general election is to occur within sixty days.

The recall election is subject to all the restrictions provided to safeguard other State elections. In some States the statutes have been made extremely detailed and exacting, notably in Washington (Act of March 21, 1913).

The ballot, as stated above, contains the petitioners' charges against the official, and — if he chooses to supply it — his own justification of his course in office. Each statement is ordinarily limited to two hundred words.

The first two States, Oregon and California, to introduce the recall applied it in different forms, and the other States have followed one or the other of them. In Oregon the incumbent's name goes upon the ballot as a candidate for election to the office which he holds, together with the names of any other candidates who may have been placed in nomination by petition. His recall is effected by his failing to secure a plurality of the votes cast at the election for filling his office. In California, on the other hand, a separate *yes* and *no* vote is taken on the question whether the official shall be recalled. If a majority of those voting on that question vote *yes*, the officer is thereby recalled, and the candidate who receives a plurality of the votes cast for filling the office is declared elected for the unexpired term. A vote for a successor is invalid if the elector fails to vote on the question of the recall. The tendency seems to be in favor of the California method of submitting the recall question separately.

Opposing candidates are usually placed in nomination by petition, signed by a specified percentage of the number of electors who at the preceding election had voted for the highest officer on the State ticket, or for the filling of the incumbent's

office. To discourage factional abuse of the recall, the Idaho Constitution provides that no signer of a recall petition may be a signer of a nomination petition for a candidate for the office that is to be vacated. The challenged official usually holds office until the result of the election is officially declared to be against him.

Appreciation of the financial hardship which the recall may impose upon the official leads Arizona to provide that to the officer who is forced to stand in a recall election there shall be refunded from the public treasury his "reasonable special election campaign expenses," setting maximum limits of $500 for a State executive officer, $200 for a member of the Legislature, and $150 for a municipal officer. California and Colorado both provide for the refunding of "any amount legally expended by him as expenses of such election," — but only in case "the incumbent is not recalled" as a result of that election.

What Officers may be Recalled?

The principal's right to discharge his agent when he is no longer faithful to his agency is the analogy to which the advocates of the recall recur. At first, its application seems to have been mainly considered in regard to executive officers. Most of the States which have introduced the recall make it apply to "every elective public officer." Kansas makes it applicable to "every public officer holding office either by election or appointment," and Arizona, "to every elective officer holding an elective office either by election or appointment." Recent constitutional amendments add detailed regulations as to the recall of members of the Legislature, the shortness of whose term makes special provisions necessary.

The Recall of Judges.

It is over the recall of judges that the most heated controversy has arisen. A similar provision to that quoted above from the Arizona Constitution stood in the draft which formed a part of the statehood bill which was passed by Congress in 1911, conferring statehood upon New Mexico and Arizona. This had been amended in Congress so that at the time of the

election of Arizona's first State officers there should be submitted to the electors a proposed amendment to her Constitution by which judicial officers should be excepted from the section permitting a recall of elective officers. Declaring that, if he signed the bill, he did not see how he could escape responsibility for the judicial recall in Arizona, President Taft vetoed the bill, with the result that statehood was denied to both of the applicants until Arizona's Constitution was submitted in a form which eliminated the recall of judges. President Taft's veto message set forth in detail the bad results which he anticipated from the "judicial recall," — "so pernicious in its effect, so destructive of the independence of the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority and therefore to be injurious to the course of free government." But no sooner had Arizona been admitted as a State than she amended her Constitution, adopting the above section making the recall applicable to judges as well as to all other elective officers; and one of her first Senators in Congress signalized his entrance into that body by forthwith introducing a resolution for an amendment to the Constitution of the United States, providing for the recall of Federal judges.

The first attempt to invoke the recall of a judge was in Oregon, the ground being a charge to a jury in a murder trial, in which the judge gave such instructions as to what constituted self-defense that a verdict of "not guilty" was rendered in a case which was generally believed to be one of willful murder. The recall in this instance never came to the test of an election, for the cost in time and money of securing petition-signatures proved too heavy to be sustained by the feeling which had been aroused. The first successful removal of a judge by the recall was in California, April 22, 1913, where a police judge (Charles Weller of San Francisco) — not for the first time — allowed an assailant of a young girl to escape trial through forfeiting small bail. The community was greatly aroused by the judge's lack of recognition of the seriousness of the charge, as evidenced by imposing a bail of but $300, whereas the average amount of bail he imposed in grand larceny cases was $1,400.

The actual use of the recall of judges has been much more

infrequent than its opponents predicted, and those who favor it maintain that the consciousness that the recall is available serves to keep a judge alert to his duties to the public and as sensitive in his concern for the rights of humanity as for those of property.

This process of removing judges has been much under debate. In the discussion of the recall amendments of the Constitutions of Oregon (1908) and California (1911) the proposal attracted little attention, especially as Congress had no control over the issue. Since the excitement of the Arizona controversy, it is not without significance that four of the seven States which have ratified recall amendments have explicitly excluded judges from their application. Their limitations are phrased as follows:

1912. Idaho, "Every public officer in the State except judicial officers."
1912. Washington, "Every public officer in the State except judges of courts of record."
1913. Michigan, "All elective officers except judges of courts of record and courts of like jurisdiction."
1914. Louisiana. . . . "Except judges of all courts of record of the State, judges of the various city courts, and justices of the peace."

The "Advisory Recall" of Federal Officers by State Electors.

Arizona, to whose people the recall seems a peculiarly congenial political device, has worked out an interesting variant in the "Advisory Recall," as applied to United States Senators and Representatives, elected to Federal office by the voters of Arizona, and to the United States District Judge for the District of Arizona, appointed by the President. Following the precedent set by Oregon in securing popular control of the election of United States Senators, the Arizona statute expressly grants to any person seeking to become a candidate for the office of Senator or Representative in Congress the privilege of signing "Statement No. 1," which reads as follows: "If elected to the office of . . . , I shall deem myself responsible to the people, and under obligation to them to resign immediately, if so requested by an advisory vote." Or he may sign "Statement No. 2," declaring that he shall not deem himself under

obligation so to resign. In accordance with the candidate's action in the matter, the Secretary of State is instructed to place under his name on the ballot: "Pledged to Advisory Recall," or "Refuses Pledge to Advisory Recall," or "Silent as to Advisory Recall." At the election at which votes are cast upon the question of requesting the official's resignation, by preferential vote the electors express their choice for his successor, and, "if a vacancy occur," the Legislature or the Governor — upon whichever it may devolve to make the appointment — "shall thereby be advised of, and shall consider the majority candidate the preference of the electors for the unexpired term."

The same elaborate procedure of "Statements," petition, request for resignation, a special election to pass upon that "Advisory Recall" and at the same time to put forward by preferential votes candidates "Recommended to the President for Appointment" has also been applied to the office of United States District Judge for the District of Arizona. And whenever any vacancy in that position is caused by death or resignation, aspirants are given the opportunity to pledge themselves to resign immediately, if so requested by an advisory vote. Of course the President of the United States is not under the slightest legal obligation to give heed to any such recommendations for appointment, but there is significance in this attempt to subject to popular control even the President's appointee to a Federal office.

How Frequently will Recall Elections Occur?

The state-wide recall has been in operation less than ten years, and has not as yet been actually invoked. That very fact suggests that there must be obstacles to its frequent use. In the first place, difficulties are inherent in the securing of so large a percentage of electors as signers of recall petitions; and in several States this difficulty has been substantially increased because of the adoption of equal suffrage, which has practically doubled the basis on which the petition-signers' percentage must be reckoned.[1] The provision that no recall petition shall be filed until the officer has held his office at least

[1] See "The Recall in Seattle," in W. B. Munro's *The Initiative, Referendum and Recall*, 331–341, for some account of the difficulty in securing signatures, of the shrinkage in the lists, particularly because of *withdrawals*, — of which there were 1,100 in a single city recall campaign.

six months lessens the likelihood of the defeated aspirant's trying to oust his successful rival.

But the several States have adopted various regulations yet more stringently limiting the recall privilege. The most frequently prescribed deterrent to the filing of repeated recall petitions against an officer whom a previous recall election has failed to oust is the requirement, similar to that found in Oregon, that "no further recall petition shall be filed against the same officer during the term for which he was elected, unless such further petitioners shall first pay into the public treasury, which has paid such special election expenses, the whole amount of its expenses for the preceding special election." Similar provisions are found in several States. The drain thus caused upon the petitioners' pockets, in addition to the expense necessary to pay petition-circulators for soliciting signatures, must be considerable enough to lessen enthusiasm for a recall campaign that has no substantial basis. To secure the same result Colorado relies not upon the refunding of past election expenses but upon the requirement that the petitioners for a second recall against an officer shall "equal fifty per cent of the votes cast at the last preceding general election for all the candidates for the office."

The Recall in Municipal Government.

In local government the recall has spread much more widely than in the field of State government. It has been generally introduced as a feature of the commission and commission-manager forms of city government, and general provision for its adoption by cities has been made in the laws of some twenty-five or thirty States. Alabama alone has provided that the recall petition shall call for signatures of a definite minimum number, one thousand, of voters. In the other States the requirement is of a certain percentage of the voters, ranging from ten per cent of all the city's qualified voters in Virginia to fifty-five per cent of the voters who took part in the last city election in Illinois. The details of the charter requirements and of the experience under them, in these many States, lie outside of the field of this report.[1]

[1] In *Equity*, October, 1916, there is a very comprehensive study of the legal basis of the recall of municipal officers in the several States, and reports, mostly from enthusiastic advocates, as to its operation.

The Recall in Municipal Government in Massachusetts.

Although the General Court of Massachusetts enacted in 1915 a statute "To Simplify the Revision of City Charters" (Chapter 267), which provided that the voters of any city except Boston might, without recourse to the Legislature, adopt for themselves any one of four standard forms of charter, and although among the four set forth in the Act were the commission form and the commission-manager form, with which the recall, as well as the initiative and referendum, is usually associated, no provision was made for the recall as a feature of any standard charter. The recall has, however, been introduced in the charters of the following cities, which were granted by special act:

Year.	City.	Percentage, Signers of Petition.	Basis of Percentage.
1908	Haverhill, . . .	25	Aggregate number of votes cast for mayor at last preceding city election when a mayor was chosen.
1910	Lynn, ...	25	Same as Haverhill.
1911	Lowell, ...	20	Same as Haverhill.
1911	Lawrence, . . .	25	Aggregate vote cast for all candidates for Governor at the last preceding State election in Lawrence.

In Haverhill, Lynn and Lowell the recall is applicable to the holder of any elective office, — the Lawrence charter adds: "whether elected thereto or appointed to fill a vacancy." In each of these four cities, the "Oregon" model is followed. There is no separate voting upon whether the incumbent shall be recalled — that is, his name is placed upon the ballot, without nomination, unless he requests otherwise in writing, and the election is for an officer to fill out his unexpired term, his own name standing with those of other candidates. He is "recalled" if he fails to secure a plurality of the votes cast.

The recall was successfully invoked against a member of the School Committee in Lawrence.

The Recall of the Mayor in Boston.

A point frequently made in favor of the recall is that it "permits the lengthening of official terms without thereby risking the establishment of a bureaucracy."[1] This consideration weighed with those who framed the recall section of the

[1] Munro, *The Initiative, Referendum and Recall*, 48.

Boston charter which became effective in 1909. The mayor's term was lengthened to four years, but the voters are given an opportunity to pass their verdict upon his record in office at the end of two years. At the State election in November preceding the end of the mayor's second year (the Boston city elections being held in January) the question goes automatically upon the ballot: "Shall there be an election for mayor at the next municipal election?" If a majority of the qualified voters registered in Boston for that State election vote *yes* on that question, there shall be an election for mayor in the following January, at which time the incumbent's name goes on the ballot, unless in writing he shall request otherwise. The mayor then elected holds office for four years, subject to recall at the end of two. The recall in Boston is thus made applicable only to the mayor, and in his case it can be invoked but once, *viz.*, at the end of the first half of his term; and at that time the question is not raised by petition, but comes inevitably before the voters for their answer as to whether a recall election shall be held. The results of this unique provision's working are indicated by the following table:

Election for Mayor, January 11, 1910.

Registered voters, 112,265; ballots cast, 95,895.

Vote for mayor, by candidates: —	
John F. Fitzgerald,	47,177
James J. Storrow,	45,775
All others,	2,441
Blank ballots,	502
Total,	95,895

Vote on Recall of Mayor, November 7, 1911.

Yes,	37,682
No,	32,142
Total,	69,824

But the number required for adoption was a majority of all the registered voters at that State election (108,386) or 54,194.

Election for Mayor, January 13, 1914.

Registered voters, 110,946; ballots cast, 81,559.

Vote for mayor, by candidates: —	
James M. Curley,	43,262
Thomas J. Kenny,	37,522
All others,	39
Blank ballots,	736
Total,	81,559

Vote on Recall of Mayor, November 2, 1915.

Yes,	47,396
No,	35,784
Total,	83,180

But the number required for adoption was a majority of all registered voters at that State election (113,979) or 56,990.

It will be noted that in both of these votes at the half-way point in the mayor's term a large majority (5,000 in the first instance and nearly 12,000 in the second) favored the holding of the recall election. In fact, in 1915 the demand for the recall exceeded by more than 2,000 the total number of votes which had elected the mayor to his office. Yet even this did not meet the legal requirement of a majority of all the registered voters, not at the time when the mayor was elected, but nearly two years later, — a period which ordinarily would bring a substantial increase in registration, and thereby make the number of recall votes yet harder to attain. In the second of these cases — and the probability is that this is inherent in the situation — the requisite number of *yes* votes in favor of a recall election was greater by several thousands than the entire vote which had placed the mayor in office. It is evident that under the present provision of the charter few mayors of Boston need fear removal by this unique form of the recall.

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BULLETIN No. 27

PREFERENTIAL VOTING

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PREFERENTIAL VOTING.

I. Introduction.

The Constitution of Massachusetts originally provided for the election of the Governor, the Lieutenant-Governor and the members of the Senate by a "majority of votes" and established other methods of determining a choice in case no candidate received such majority at the polls. This requirement was abolished in 1855 by the Fourteenth Article of Amendment, which provided that "In all elections of civil officers by the people of this Commonwealth, whose election is provided for by the Constitution, the person having the highest number of votes shall be deemed and declared to be elected." Election by plurality was thus substituted for election by majority.

The practical objection to the system of election by majority is that where there are more than two candidates for an office a failure to elect any one of them at the polls is always a possibility; the practical defect of the system of election by plurality is the obvious fact that where there are more than two candidates for the same office the person elected is frequently the choice of a minority among the voters.

Preferential voting is a plan which aims to overcome both of these objections by providing a ballot upon which the voter may indicate not only his first choice but his second choice and even additional choices among the candidates for any office. Preferential voting should, however, be clearly distinguished from proportional representation (see Bulletin No. 28) which aims to secure representation for minorities and in so doing under some systems uses a ballot upon which the voter indicates his first choice, second choice and additional choices among the candidates. Preferential voting, in a word, aims to provide a plan whereby the will of a majority among the voters may be ascertained and carried into effect, while proportional representation furnishes a scheme whereby the majority is pre-

cluded from electing all the officers (where there are several elected) and the minority among the voters is enabled to secure its due share of representation.

Preferential voting, in one form or another, is in use at final elections in Queensland and in Western Australia; in the cities of Cleveland, Denver, Spokane and Grand Junction, as well as in many smaller municipalities (see p. 313); it is in use at primary elections in several States of the Union, including Maryland, Washington, Oregon, Indiana, Idaho, Wisconsin, Minnesota and North Dakota.

The three methods of preferential voting most commonly used are known as the Ware System, the Bucklin System and the Nanson System respectively. A brief description of each will be given.

II. The Ware System.

Under this system, which was devised by Professor W. R. Ware, the voter is allowed to express his preferences among the candidates — as many or as few as he pleases — by putting the figure 1 opposite the name of his first choice, the figure 2 opposite the name of his second choice, and so on. The first count is only of the first-choice votes. If no candidate has a majority, the lowest candidate is excluded and his votes only are scrutinized again and added to the votes of the other candidates as the preferences indicate. The candidates are thus successively excluded until only two are left, of whom the higher will have a majority vote (as between the two left), and be elected.

This system is called in Great Britain the "alternative vote", and in Queensland, where it is used in truncated form, the "preferential vote". That it is preferable to the "second ballot" used in Austria-Hungary, France, Germany, Italy, Norway, and other European countries, is generally conceded by those who compare the two. It does at a single election more than the second ballot system does in two, and does it better. It is not, however, a perfect majority system, for, like the second ballot system, on which it is so obviously an improvement, and like our own double election system, on which it is a still greater improvement, it may drop out at some stage of the whole process of election a candidate who is really pre-

ferred by a clear majority to any other candidate in the field taken singly.

The preferential voting system used in the primary elections of Wisconsin, Minnesota and some other States is the Ware system modified (1) by the restriction of the voter to the expression of but two preferences to any office, (2) by provision of a first choice and a second choice column, instead of the numerals 1 and 2, for the indication of preferences, and (3) by the adaptation of the rules for counting the votes to the provision that a voter may express only two preferences.

III. The Bucklin System.

The preferential system used in the cities of Grand Junction and Denver, Colorado, Spokane, Washington, Portland, Oregon, Cleveland, Ohio, and in the State of North Dakota, was first proposed by Condorcet in 1793. It is said to have been used for a time in Geneva, Switzerland. In recent times, however, it first came into prominence on its adoption in 1909 by Grand Junction, Colorado, under the leadership of Hon. James W. Bucklin of that city.

Aside from certain unessential features this system as thus far actually applied in America differs from the Ware system only in the rules of the count. The Ware rules prescribe, if there is no majority of first choices, the dropping out of the candidate lowest on the poll and the distribution of his ballots only according to the second or next highest available preference marked on them, then the dropping of the next lowest candidate in the same way, and so on until one candidate has a majority of the votes behind him. The Bucklin rules, on the other hand, prescribe, if there is no majority of first choices, the adding together of the first-choice and second-choice votes for each candidate to see whether any candidate has a majority when both are counted; next, if no candidate has such a majority, it prescribes the adding together of the first-choice, second-choice, and third-choice votes for each candidate to see whether any candidate has a majority, counting the three grades of votes together; and so on until some candidate has behind him a majority, counting all the grades of votes thus far taken into account, when that candidate is declared elected.

IV. The Nanson System.

A preferential system that differs from the Ware and the Bucklin plans only in the rules of the count has been devised by Professor E. J. Nanson, of the University of Melbourne, Australia. Under this system a first choice is given more credit than a second throughout the entire count, a second more than a third, and so forth. Then, in accordance with simple rules formulated by Professor Nanson on the basis of a mathematical solution of the problem, those candidates whose total credits show them to be unquestionably inferior to other candidates in the opinion of the voters as indicated on the ballot are successively dropped out as defeated until the candidate preferred to any other is left and declared elected. Following are the complete rules for this system: —

1. At the voting precincts transcribe on coördinate paper (ruled to correspond with the spacing of the names of the candidates on the ballot) the figures marked on the ballots by the voters, using a separate column for each ballot and numbering both ballot and column with a distinctive number in order to be able at any time to compare the original ballot with its record. Send the record to the central electoral board, as ordered by that board.

2. On the record, but not on the ballots, let the central electoral board fill in all blank spaces with the figure found by dividing by two the sum of the number of candidates and a number one higher than that indicating the last preference marked on the ballot by the voter. (This is merely finishing the voter's work by giving each unmarked candidate the average to which all unmarked candidates are entitled. It insures the counting of the ballot in the subsequent addition to the disadvantage, and to the equal disadvantage of the unmarked candidates, just as the voter intended. Example: if there were seven candidates, the blank spaces on the ballots showing only three preferences would all be filled in with the number $5\frac{1}{2}$; those on ballots showing four preferences, with the number 6; etc.)

3. Add the figures of each candidate.

4. Exclude as defeated every candidate whose total is equal to or more than the average. (This is reasonable because the voter used larger figures to represent lower preferences.)

5. If more than two candidates remain, set down on record sheets figures representing the preferences on all the ballots as among the candidates remaining. Add again, eliminate all candidates whose total is equal to or more than the average.

6. Proceed again, if necessary, as prescribed in rule 5, until only two candidates remain. When only two remain, examine the record to see which of those two was preferred to the other by the voters, and declare him elected.

7. If only one candidate remains after an elimination of candidates, declare him elected.

V. Provisions for Preferential Voting in Massachusetts Cities.

A provision for preferential voting in cities was suggested in the Report of the Joint Special Committee on City Charters of the Massachusetts Legislature in January 1915 (Senate, Doc. No. 254), but this portion of the report was not adopted with the remainder as a part of Chapter 267, Acts of 1915.

Chapter 261, Special Acts of 1916, amended by Chapter 166, Special Acts of 1917, authorized the City of Newton to use preferential voting at municipal elections.

The Legislature of 1917 authorized the city of Gloucester to use preferential voting at its municipal elections (Chapter 254).

These acts provide for the nomination by petition of a certain number of qualified voters, the acceptance of the nomination by the candidate, and the filing of petitions and acceptance with the city clerk a certain number of days before election. The ballot shall indicate the number to be elected to each office and shall provide three columns (if more than three candidates) headed respectively "First Choice" (or Choices), "Second Choice" (or Choices), and "Other Choices." Where there are but three candidates for any office, columns for indicating only the first and second choices are provided; where there are less than three candidates all columns but one and all references to second or other choices may be omitted. It is required that the instructions shall appear on the ballot. The ballots bear no party designations.

The sample ballot which accompanies the report of the Joint Special Committee of 1915 is here reproduced: —

MAYOR (ONE TO BE ELECTED).	First Choice, Not More than One.	Second Choice, Not More than One.	Other Choices, As many as you wish.
Richard Roe, 8 Crescent Avenue,			×
James Hoe, 4 Blue Hill Street,	×		
John Doe, 84 Ocean Terrace,		×	
Henry Poe, 2171 Main Street,			×
Louis Coe, 98 Locust Avenue,			

ALDERMEN (FOUR TO BE ELECTED).	First Choices, Not More than Four.	Second Choices, Not More than Four.	Other Choices, As Many as you wish.
John Doe, 2 Water Court,			×
James Doe, 3 Water Street,	×		
Henry Doe, 6 Water Street,		×	
Charles Doe, 8 Water Street,			×
John Brown, 10 Palace Street,	×		
James Brown, 12 Palace Street,			
Charles Brown, 14 Palace Street,		×	
John Jones, 6 Theatre Street,	×		
Henry Jones, 8 Theatre Street,			×
Charles Jones, 14 Theatre Street,			×
John Smith, 121 Board Street,			
Henry Smith, 19 Board Street,	×		
James Smith, 53 Lime Street,			×
William Smith, 42 Hay Street,		×	
Fred. Brown, 19 Brick Street,			
John Brown, 21 White Street,			×
Thomas Brown, 22 Black Street,		×	

In counting the ballots only one vote shall be counted for any candidate on any one ballot and the candidate receiving a majority of first choice votes shall be declared elected. If there is not a majority of votes on the first choice, then the second choice votes shall be counted and added to the first choice votes and if a majority of first and second choice combined is obtained, the candidate shall be declared elected. If a majority is not then obtained, the first, second and other choices shall be

added together and the candidate obtaining the highest number shall be declared elected. A tie between candidates is decided by selecting the one who has the highest number of first choices, if these be equal, then the highest second choices, and if this does not decide, a drawing by lot is provided. This is substantially the Bucklin System, as used in Grand Junction, Colorado.

VI. Cities using the Preferential Ballot.

The following cities, fifty-five in number, adopted in the year indicated a system of preferential voting: —

1909. Grand Junction, Col.
1910. Spokane, Wash.
1911. Pueblo, Col.
1912. New Iberia, La.
1913. Duluth, Minn.
1913. Denver, Col.
1913. Colorado Springs, Col.
1913. Portland, Ore.
1913. Nashua, N. H.
1913. Cleveland, Ohio.
1913. LaGrande, Ore.
1913. Fort Collins, Col.
1913. St. Petersburg, Fla.
1913. Cadillac, Mich.
1913. Houston, Texas.
1914. Vineland, N. J.
1914. Ridgewood, N. J.
1914. Nutley, N. J.
1914. Millville, N. J.
1914. Long Branch, N. J.
1914. Phillipsburg, N. J.
1914. Thirteen cities in New Jersey each under 5,000 population.
1914. Union, N. J.
1914. Orange, N. J.
1914. Atlantic City, N. J.
1914. Passaic, N. J.
1914. Trenton, N. J.
1914. Columbus, Ohio.
1914. Jersey City, N. J.
1915. Asbury Park, N. J.
1915. Irvington, N. J.
1915. New Brunswick, N. J.
1915. Bayonne, N. J.
1915. Hoboken, N. J.
1915. Patterson, N. J.
1915. Portland, Me. (Water District).
1915. Toledo, Ohio.
1916. Montclair, N. J.
1916. Newton, Mass.
1916. San Francisco, Cal.
1917. Gloucester, Mass.
1917. Newark, N. J.
1917. Santa Monica, Cal.

VII. Second Choice Nomination Laws.

The direct primary as found in most States has the defect that the nominee is usually chosen by a plurality rather than a majority of the electors. Under the convention plan, the candidates are placed before the convention by nomination and their names are balloted upon until one candidate secures a majority of the votes of the members of the convention. This

naturally provides for a large number of scattering votes in the early stages of the voting, but as successive votes are taken the delegates begin to concentrate upon stronger candidates until a majority choice is made. The direct primary does not permit this concentration since only one vote is taken.

Under a second choice nomination law, candidates are selected by a majority rather than a plurality of the votes cast. Voters are expected to designate upon their ballots their first and second choices of the candidates presented. When the count is made the candidate with the least number of first choices is dropped and the support of his followers is divided among the other candidates in accordance with their second choices. This process of elimination and distribution of votes is continued until one candidate receives a majority of the votes cast and so becomes the nominee of his party.

The statutes of Maryland (Acts of 1912, Chap. 2, Sec. 160K) provide: —

> In case there are more than two candidates for any State office, there shall be provided on the ballot two squares opposite the name of each of the candidates, which shall be designated from left to right as "First Choice" and "Second Choice," respectively, so that each voter may indicate his first and second choices or preference by placing a cross-mark in the appropriate squares aforesaid. Such cross-marks to be made in the same manner as other cross-marks. . . .
>
> If the voter marks the same candidate for first choice and also for second choice, then such ballot shall only be counted for "First Choice" for said candidate and shall not be counted at all for "Second Choice;" if for second choice only it shall be counted for first choice.
>
> The tally sheet for such candidates for State offices shall be arranged to show plainly and distinctly how the individual voters voting for any certain candidate, indicated their second choice or preference from among the remaining candidates, in the following form:

FOR GOVERNOR

First Choice.	Second Choice.	Third Choice.
Smith–111111111	Robinson–11111	Brown–111
Robinson–111111	Smith–11111	Brown–11111
Brown–11111	Smith–11111	Robinson–1111

> If any candidate shall receive a majority of all votes cast and counted for his office in any county or legislative district for first choice he shall be considered the "First Choice Candidate" of such county or legislative

district and entitled to the vote of the delegates from such county or legislative district on the first and subsequent ballots in the State Convention as hereinafter provided.

And in such case the "Second Choice Candidate" of said county shall be determined by the Supervisors of Elections as follows:

The ballots cast for said "First Choice Candidate" polling a majority of all votes of said county as aforesaid shall be distributed among the remaining candidates according to the way the voters marking the same have indicated their "Second Choice." That is by add ng to said first choice votes of each of said remaining candidates the second choice votes of those voting for the candidate polling a majority over all for first choice.

And if in such case none of said remaining candidates has then received a majority of all the votes cast and counted for said office in said county or legislative district, then the lowest of said first choice candidates shall be dropped from the canvass and the votes cast for him for "First Choice" shall be distributed among the candidates still remaining according to the way the voters marking said dropped candidate for "First Choice" have indicated their "Second Choice."

This process of dropping the lowest candidate and distributing his ballots as marked for Second Choice among the remaining candidates shall be continued by the Supervisors at the canvass until one of them shall be credited with a majority of all the votes cast and counted for said office in said county or legislative district or until there is only one candidate remaining. . . .

In case no candidate receives a majority of all the "First Choice" votes cast and counted in any county or legislative district, but only receives a plurality thereof, then the candidate receiving the lowest "First Choice" vote shall be dropped at the canvass and the ballots tallied for him for "First Choice" shall be distributed among the remaining candidates according to the way his said voters voting for said lowest candidate for first choice have indicated their "Second Choice."

This process of dropping the lowest candidates is continued until a majority is obtained or there is only one remaining. This is substantially the Ware System.

The Statutes of Washington (Acts of 1909, Sec. 10), provide: —

When there shall be four or more candidates for any State or congressional office, there shall be printed immediately under the designation of office, the following: "Vote for both first and second choice for this office." On the next line shall be printed the words "To vote for a person for first choice, mark a cross (X) in the first square at the right of the name of the person for whom you desire to vote." "To vote for a person for second choice, mark a cross (X) in the second square after the name of the person for whom you desire to vote."

In Ohio the Constitution (Art. V, Sec. 7) provides: —

All nominations for elective state, district, county and municipal office shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be used without his written authority.

In Oregon the Constitution (Art. II, Sec. 16) provides: —

In all elections authorized by this Constitution until otherwise provided by law, the person or persons receiving the highest number of votes shall be declared elected, but provision may be made by law for elections by equal proportional representation of all the voters for every office which is filled by the election of two or more persons whose official duties, rights, and powers are equal and concurrent. Every qualified elector resident in his precinct and registered as may be required by law, may vote for one person under the title for each office. Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office. For an office which is to be filled by the election of one person it may be required by law that the person elected shall be the final choice of a majority of the electors voting for candidates for that office. These principles may be applied by law to nominations by political parties and organizations.

Indiana (Sections 342–362 of Chapter 7 of the Election Laws — 1915) has one of the most complete and comprehensive preferential primary laws at present on the statute books.

This law provides that the names of candidates for President, Vice-President, United States Senator and Governor may be placed upon the ballot by petition of five hundred qualified voters of the State. Each elector is entitled to designate his first and second choice nominations for each office. The votes are counted and tallied so that the first and second choices for every candidate are shown in parallel columns. The rules for counting are thus clearly stated: —

(*a*) If any candidate for an office receive a majority of the first choice votes he shall be declared nominated for such office.

(*b*) If no candidate is thus nominated, drop the name of one having the least number of first choice votes and add the second choice votes cast by his supporters to the first choice votes of the remaining candidates for whom they were cast.

(*c*) If no candidate then has a majority, drop from the remaining candidates the one having the least number of votes then to his credit, and add the second choice votes cast by his supporters to the votes of the remaining candidates for whom they were cast.

(*d*) Repeat this operation until some candidate has a majority or until two (2) candidates remain.

The one then having the greater number of votes to his credit shall be declared nominated.

(*e*) No second choice vote shall be counted when it is cast for a candidate whose name shall have been dropped as herein provided.

(*f*) Any tie shall be decided by lot by the canvassers.

The person receiving the highest vote at such primary as the candidate of any party for any office, determined under these rules, shall be the nominee of that party and his name placed upon the ballot at the following election. The delegates to a national party convention shall be instructed and it shall be their duty to cast their votes as a unit for the candidate receiving the highest preference in the primary as long as his name is before the convention. This also is substantially the Ware System.

Provisions for second choice nominations are also found in the laws of Minnesota, Alabama, Wisconsin, North Dakota and Idaho, and follow very closely the provisions quoted above.

VIII. Summary.

1. When the ordinary ballot is used, the system of election by majority and the system of election by plurality are both subject to serious drawbacks. In the first case, a failure to elect is possible; in the second case, the person elected may be the choice of a minority among the voters.

2. The preferential ballot is a device for securing from each voter an expression of his entire opinion concerning the candidates, and not merely an indication of his first choice among them.

3. There are different systems of preferential voting, the differences being not so much in the form of the ballot as in the methods of counting them.

4. The preferential system is used in more than forty American cities, including such large municipalities as San Francisco, Cleveland and Denver.

5. In 1915 a joint special committee of the Massachusetts Legislature recommended that cities of the Commonwealth, other than Boston, should be allowed to adopt the system of preferential voting for city elections. The Legislature did not accept this recommendation.

6. Two Massachusetts cities, Newton and Gloucester, have been authorized by statute to use preferential voting at municipal elections.

7. The preferential ballot, in a somewhat modified form, has been used at primary elections in several states of the Union.

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BULLETIN No. 28

PROPORTIONAL REPRESENTATION

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PROPORTIONAL REPRESENTATION.

I. The Purpose of Proportional Representation.

Proportional representation is a plan or system of choosing representative bodies so that all considerable groups of voters will be represented in proportion to their numbers.[1]

Popular voting, which is the very basis of our government, is a process by which two distinct objects should be carried out: first, to make decisions between policies or between candidates for administrative offices; second, to select a body fit to make decisions on behalf of all voters, that is, to make up a deliberative or representative body.[2]

II. The Principle of Proportional Representation.

The principle of proportional representation is that each political party or "each considerable party or group of opinion" shall be entitled in all representative bodies to a number of representatives proportionate to the number of its voting members. Thus a party casting forty per cent. of the total vote in a State election would be entitled to four-tenths of the seats in the State legislature. "This proposal is advocated on the ground that a truly representative body should represent as nearly as possible the whole electorate and not merely the greatest number voting for one candidate in each of the several representative districts, as is the case under the established system of plurality representation." [3]

III. Development of Proportional Representation.

In one form or another proportional representation is in use in Belgium, Sweden, Finland; in nine of the cantons of Switzerland; in some of the States of the German Empire; in Den-

[1] On the distinction between *proportional representation* and *preferential voting* see Bulletin No. 27, p. 5.

[2] Hoag, C. G. *Effective Voting*, 63d Congress, 2d Session, Senate Doc. 359.

[3] Holcombe, A. N. *State Government in the United States*, 138.

mark (incorporated in the Constitution in 1885, for the election of seventeen members of the Rigsdag); in Tasmania, in Australia (since 1896) and in South Africa. In 1912–13 the system was adopted for the election of the Irish Senate in the Irish Home Rule Act as passed by the Parliament of Great Britain.

The proposal to elect representatives by some system of proportional representation . . . has been discussed in America ever since the publication shortly before the Civil War of J. S. Mill's influential essay on Representative Government. Various systems have been experimented with, notably cumulative voting, adopted for the election of the members of the lower house of the Legislature in Illinois in 1870, and limited voting, employed in the election of delegates to the Pennsylvania Constitutional Convention in 1873. Interest in proportional representation declined in the seventies, but revived two decades later.[1]

IV. Minority Representation.

The provision for minority representation in the election of members of the State House of Representatives was introduced in the Illinois Constitutional Convention of 1870. The purpose of this measure was to destroy the sectional feeling that then prevailed in the State. The real problem of the constitution-makers in Illinois in 1870 was to overcome the tendency of the majority party in the State to have a majority in each district, and so shut out the minority from the lower branch of the Legislature. It was therefore provided that each district should elect three members and that each voter should have three votes which he might distribute at will, one to each of three candidates, or which he might cumulate upon one or two candidates. By allowing the voter to cumulate three votes for one candidate it was possible for any party or faction embracing more than one-third of the electorate to secure one representative.

The Constitution of Illinois (Art. IV., sects. 7 and 8) provides: —

The House of Representatives shall consist of three times the number of the members of the Senate, and the term of office shall be two years. Three representatives shall be elected in each senatorial district and at the general election in the year of our Lord one thousand eight hundred and seventy-two, and every two years thereafter. In all elections of represent-

[1] Holcombe, 456.

atives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected.

V. The Progress of Proportional Representation in the United States.

Proportional representation has been seriously considered by several States other than Illinois, but it has not been adopted by any of them. Various cities, likewise, have had the plan under consideration, and one of them (Ashtabula, Ohio) has put it into actual operation. A few of these definite proposals may be briefly summarized.

1. Oregon.

A constitutional amendment adopted by the people of Oregon in 1908 (Art. II., Sec. 16) authorized the use of proportional representation in such cases as the Legislature might determine. The People's Power League in Oregon has been pressing for the election of members of the State Legislature by a plan of proportional representation and in 1914 submitted such a proposal to the voters of the State, but it was rejected by a large majority.

2. New York.

The following proposed article of amendment was introduced in the New York Constitutional Convention of 1915 but was not adopted by the Convention for insertion in the draft of a new constitution:—

> The Legislature may provide that the election of the members of the Legislature, either or both houses, or of any constitutional convention hereafter to be held, or of any elective body or board of the State, or of any political subdivision thereof, shall be by any plan embodying the principle known as proportional representation.

3. In Congress.

In the Sixty-fourth Congress a bill was introduced by Representative Bailey of Pennsylvania, providing that States choosing three or more Congressmen should be permitted to select them

by some method of proportional representation of all parties or all groups of voters according to their respective numbers. A hearing was held but no action taken upon the bill.

4. Springfield, Massachusetts.

Two proposed new charters for Springfield were submitted to the Massachusetts Legislature in 1915. One provided for the so-called "federal" type of city government, the other for the adoption of what is commonly known as the "city manager" plan. Both of these proposed charters contained provision for the election of the city council and the school committee by a plan of proportional representation. This provision was, however, stricken out by action of the Legislature, and when the voters of Springfield cast their ballots upon the adoption of a new charter this provision for proportional representation was not in either of the alternatives submitted to them. Both proposed charters were rejected.

5. Ashtabula, Ohio.

This is the only American city of any size in which proportional representation has had an actual trial.[1] Under the Ohio home-rule amendment, Ashtabula in 1914 elected a charter commission to draft a new form of city government. The commission favored the commission-manager form of government with a council elected at large. Already the objection had been advanced in Ashtabula that a council so elected would probably represent only one party, and that this was not desirable if the council was to choose the manager, who was expected to be a permanent non-political expert. The commission finally rejected proportional representation as a novelty likely to jeopardize the acceptance of the charter as a whole when submitted to the voters. As submitted in November, 1914, the charter provided for a council of seven, nominated on a five per cent petition and elected at large in the usual way on a non-partisan ballot. It was adopted. But in August, 1915, a proportional representation amendment was submitted, voted on, and carried. In November, 1915, Ashtabula elected its first council under the

[1] Since the above account was prepared, Kalamazoo, Michigan, has adopted proportional representation and has had an election by that plan.

new charter — the first adoption of genuine proportional representation for the election of any public body in the United States.

The essential principles of the Ashtabula plan are:

1. The voting is at large but the voter has only one vote;

2. The voter may express his preferences among candidates as fully as he pleases;

3. The candidates up to the number to be elected who have behind them the largest constituencies of support are to receive the seats;

4. Every ballot, as far as possible, is to be made effective towards electing the candidate preferred by the voter among those whom it can help to elect.

It is generally conceded in Ashtabula that the system is not bewildering to the voters, that the counting is not especially laborious, and that there is no great chance for fraud or manipulation in the counting. The details of the plan are explained in the next few paragraphs.[1]

VI. Various Systems of Proportional Representation.

1. The Hare System.

The system adopted in Ashtabula is the Hare system, the same which was enacted for the election of the Irish Senate in the act providing for Home Rule in Ireland, and which has been for some years established in Denmark, South Africa and in Tasmania. It is called the Hare system from its originator, Thomas Hare.

The ostensible object of the Hare system of election is to supply democratic government with the best possible basis, namely a representative body that truly represents the voters. Of the several systems of proportional representation that have been devised, the Hare system is the one that gives the voter the most freedom.

The essentials of this system as usually embodied in legal provisions may be seen from the following typical example: —

Section 1. Nomination of candidates shall be at large by petition of . . . . qualified voters, and the petition for each candidate shall contain his signed assent.

[1] See also Bulletin No. 13, *The City-Manager Plan of Municipal Government.*

Section 2. The full names of candidates so nominated shall be printed on the official ballot in alphabetical order.

The following rules shall be printed at the top of each ballot under the heading of "Directions to Voters."

Put the figure 1 opposite the name of your first choice. If you want to express also second, third, and other choices, do so by putting the figure 2 opposite the name of your second choice, the figure 3 opposite the name of your third choice, and so on. You may express thus as many choices as you please.

This ballot will not be counted for your second choice unless it is found that it cannot help your first; it will not be counted for your third choice unless it is found that it cannot help either your first or your second, etc. The more choices you express, the surer you are to make your ballot count for one of the candidates you favor.

A ballot is spoiled if the figure 1 is put opposite more than one name. If you spoil this ballot, tear it across once, return it to the election officer in charge of the ballots, and get another from him.

Section 3. Ballots cast for the election of members of the . . . . shall be counted and the results determined by the election authorities according to the following rules:

(*a*) On all ballots a cross shall be considered equivalent to the figure 1. So far as may be consistent with the general election laws, every ballot from which the first choice of the voter can be clearly ascertained shall be considered valid.[1] . . .

Briefly, then, the process is this: The voter indicates his first choice by marking 1 after name of his first choice, his second choice by 2, and so on as far as he has any choice between candidates. The count proceeds thus: — First, the election officers compute the quota as follows: they add one to the number of candidates to be elected, and then divide by this the total number of votes cast. The quota is the next whole number larger than the result of this division. (The quota is simply the smallest number of votes which, considering the number of votes cast and the number of seats to be filled, will absolutely assure a candidate's election). All those candidates for whom a number of first choices is indicated in excess of the quota are declared elected forthwith. All ballots marked in the first instance for a successful candidate and not required to make up his quota are then selected by lot and transferred, in accordance with the second or third choices indicated, to other candidates whose quotas are not yet complete. If full quotas

[1] The latest and best explanation of the provisions of the Hare system is to be found in the *Proportional Representation Review* for January, 1917.

are not thereby obtained for a sufficient number of representatives, the next step is to drop the candidate who has the smallest number of ballots, so far in the count, to his credit; and distribute his ballots, in accordance with the choices indicated thereon, among the unelected candidates remaining in the contest. This process of elimination and redistribution is kept up until the proper quotas have been obtained for the required number of representatives, or until no more candidates remain than there are representatives to be chosen. The remaining candidates are thereupon declared elected. Each successful candidate is thus the unanimous choice of his own particular constituency, that is, of those whose votes made up his quota. The counting is open to the public, the press, and the candidates.

The disadvantages of the Hare system are (1) the necessity of bringing together of the ballots from the precincts for the completion of the count; (2) the fact that the count is harder to explain and longer to carry out; (3) the fact that unless the rules of the count are elaborated a great deal, some small elements of chance remain.

2. The List System.

One of the simplest schemes of proportional representation in which a sort of preferential ballot is used is the List system. It is in use in Belgium, Sweden, Finland and Switzerland, and has been seriously considered for adoption in France. It is based on the assumption that nominations will actually be made by political parties and that the chief requisite in a system of proportional representation is that it secure for each party a share of the seats of the legislature corresponding to its proportion of the total popular vote. The ballot is prepared and the count conducted variously in different countries but the underlying principle is the same. The elector votes for a party ticket and the count is so conducted that the exact number of representatives to which a party is entitled by virtue of its voting strength shall be chosen from among candidates of that party. The nominations are in lists, preferably by petition. Such a ballot is voted by marking a cross against one name on one list, which means that the vote is to count toward de-

termining how many representatives the supporters of that list are to elect and that it is to help the candidate marked to obtain a high position on that list. The system provides a means by which at a single election the voters of a large district can form almost perfectly unanimous constituencies each one of which contains approximately the same number of voters that there would be in an entire single member district under our present system. The method of counting is as follows: Each list is entitled to a number of seats proportional to the total vote for all the candidates on the list. In filling these seats the candidates are taken in the order of the number of votes received by each.[1]

Compared with the Hare system, the List system has the advantage of being as simple as the ordinary system of election now in use in Massachusetts, and the disadvantage that it requires the voter to help a ready-made list.

3. The Gove or Schedule System.

A third scheme is the Gove or Schedule system.[2] Under this plan the candidates' names are printed on the ballot in a single column as under the Hare system. But under this plan each candidate really stands for a whole list, the distinguishing feature of the plan being that every ballot that cannot help elect the candidate for whom it is cast — either because he has enough without it or because he is hopelessly out of the running even with it — is to be counted to help one of the other candidates in accordance with a schedule of preferences handed in to the electoral officials by the candidate himself and duly published several days before the election. Differing from the List, the Schedule plan lends itself to the Massachusetts form of ballot; it offers the voter many "slates", a different one for every candidate; it allows the candidate's name to be on more than one "slate." As compared with the Hare system, it has the same advantage and disadvantage that the List has.

A variant of the List System has recently been suggested in Massachusetts. The independent voter may mark for three candidates regardless of party, thus helping each to attain a high

[1] For further details see C. G. Hoag, *Effective Voting*, in 63d Congress, 2d Session, Senate Doc. 359.

[2] *Ibid.* 28.

place in the list of his respective party; the partisan voter may mark a cross in the party circle of one party and then vote for three candidates of that party. The relative position of the various parties is determined by the party circle votes. All votes above those needed exactly to supply quotas in any given district, and all seats in any district which are not filled by receiving an exact quota are collected and apportioned at large, to the end that the total representation for the whole State shall be exactly proportional to the party votes of the whole State. Provision is also made for writing in names on the ballot.

This proposed Massachusetts system is as simple as the ordinary List system, and has the advantage of permitting nonpartisan and independent voting.

VII. Conclusion.

From the foregoing discussion of proportional representation, the following conclusions may be drawn.

1. The outstanding defect of the system of election by plurality is that where a number of officers are to be elected, one political party or other faction among the voters is likely to secure the election of its entire list of candidates, while the minority, even though it be relatively strong, secures no representation at all.

2. In one form or another proportional representation has obtained recognition in many foreign countries.

3. While proportional representation has been seriously considered for adoption by various American States and municipalities, it has been given a fair trial in one community only, namely in Ashtabula, Ohio. (The Illinois system of limited voting in State elections is not considered by the advocates of proportional representation to be a system of proportional representation at all.)

4. There are various systems of proportional representation, of which the Hare system is the best known. This system is used in Ashtabula.

5. In an actual trial of proportional representation at the Ashtabula election in November, 1915, no practical difficulties or complications of any importance were encountered.

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BULLETIN No. 29

THE BASIS OF THE APPORTIONMENT OF REPRESENTATION IN THE SEVERAL STATES

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THE BASIS OF THE APPORTIONMENT OF REPRESENTATION IN THE SEVERAL STATES.

I. The Theory of Representation.

In many of the countries of Europe and in America prior to the Revolution, the theory of the apportionment of representation was radically different from that which prevails in the United States to-day. In colonial America, as in Europe at the present time, members of legislative bodies were regarded as officers of the government of which they formed a part rather than as representatives of the constituencies which elected them. In consequence, less importance was attached than is now the case to the district from which the representative was chosen. At the present day the predominant consideration is one of numerical equality. Whether a representative is chosen on the basis of population or of male inhabitants or of legal voters, the ideal is that the constituency of each representative shall so far as possible be numerically equal to the constituency of each of his colleagues. Prior to the Revolution, numerical equality was little thought of. In New England the towns were the units of representation, and the numbers which they were authorized to elect had little reference to the number of their inhabitants or legal voters. In Connecticut, the charter provided that not more than two persons might be elected by each "place, Towne or Citty." In Rhode Island the charter assured the larger places, such as Newport, Providence, Portsmouth and Warwick, a certain predominance, and provided that the other "places, townes and cityes" should elect not more than two persons each, as the Legislature might determine. In New Hampshire, also, the Constitution of 1776 left the apportionment of representatives to the Legislature. In Massachusetts, as in Rhode Island and New Hampshire, the Legislature was to determine the number to be elected by each "County, Towne and Place." In the

exercise of this authority, the Legislature assigned to each town at least one representative, but inequalities of population could be corrected to some extent by the assignment of additional representatives to the more populous places. In Vermont, the first new State to be admitted to the Union, the New England tradition prevailed, and every "inhabited town" was authorized to elect one member regardless of its population.

In the South, the county played somewhat the same role in the distribution of representatives that the town did in New England, but even the earliest of the constitutions adopted in the Southern States recognized the desirability of attaining something like numerical equality. Delaware assigned to each of its three counties the same number of representatives, and even the great growth of the city of Wilmington was not allowed to disturb this arrangement until 1897. Virginia assigned two representatives to each county and one each to Williamsburgh and Norfolk and to any other cities or boroughs which the Legislature might designate. North Carolina allowed two members to each county and one each to six specified towns.

It was Pennsylvania which, in its Constitution of 1776, first established the rule which has come to be regarded as the fundamental principle in the apportionment of representatives, — namely, that in order to keep pace with changes in the distribution of population there shall be a re-apportionment at certain specified intervals but at no other times. In Pennsylvania and a few other States, the interval was seven years, but in more than half the States it is now ten years and the apportionment is usually based on the decennial census.

While numerical equality is the ideal which is usually striven for in the apportionment of representatives, there is one striking exception which should be noted. In States in which there is a single large city containing a large part of the total population of the State, there is no disposition to allow such a city to elect a proportionate part of the members of the Legislature. New York City contains 52.2 per cent of the total population of the State, but it elects only 63 out of 150 members of the House of Representatives. Providence contains 41.3 per cent of the population of Rhode Island, but it is allowed only 25 out of 100

members of the House. The city of Baltimore also must be content with 24 members out of a total of 102, although it possesses 43.1 per cent of the population of Maryland. Chicago contains 38.7 per cent of the population of Illinois but it elects only 42 out of 153 members of the House of Representatives.

II. The Basis of Representation.

Because of the changes which are constantly occurring in the distribution of the population of the various States, it is necessary to revise from time to time the apportionment of the members of the Legislature, in order to secure an equable representation, from a numerical standpoint, of the population of the several sections of the State. In order to do this it must first be determined what shall be the basis of representation.

In each of forty-four States the entire population or a definite portion of the population is prescribed by constitutional provisions as the basis of the distribution of members of one or both branches of the Legislature. In seventeen of these forty-four States the population or portion of population prescribed as the basis of representation is determined by the Federal census only; in fifteen States by the Federal and the State censuses alternately; in six States by the State census only; and in six States by either the Federal or the State census, as the Legislature may determine. These forty-four States, classified according to the method of determining the population, number of legal voters, etc., for purposes of apportionment, are as follows:

By Federal Census only.

California.	Michigan.	Pennsylvania.
Connecticut.	Mississippi.	Texas.
Georgia.	New Jersey.[2]	Virginia.[4]
Illinois.	North Carolina.	West Virginia.
Kentucky.[1]	Ohio.	Wisconsin.
Louisiana.	Oklahoma.[3]	

[1] By "last enumeration" the Federal census presumably is meant, as no provision is made in the Constitution for a State enumeration of the population.

[2] Population is prescribed as the basis of representation in the case of Representatives only.

[3] Population is determined by the Federal census, or in such manner as the Legislature may direct.

[4] Presumably the Federal census is meant, as provision is made for an apportionment of the State into Senate and House districts in 1912, and every tenth year thereafter.

By Federal and State Censuses alternately.

Colorado.	Nebraska.	Rhode Island.[1]
Iowa.	Nevada.	South Dakota.
Kansas.	New Hampshire.[1]	Utah.
Minnesota.	North Dakota.	Washington.
Montana.	Oregon.	Wyoming.

By State Census only.

Florida.	Maine.	New York.
Indiana.	Massachusetts.	Tennessee.

By Federal or State Census as determined by the Legislature.

Alabama.[2]	Maryland.[3]	South Carolina.[5]
Arkansas.	Missouri.[4]	Vermont.[6]

1. Entire Population.

The entire population is prescribed as the basis of apportionment of members of both branches of the Legislature in twenty-five States, as follows:

Alabama.	Louisiana.	Oklahoma.
Colorado.	Maryland.	Pennsylvania.
Connecticut.	Michigan.	South Carolina.
Florida.	Mississippi.	Utah.
Georgia.	Missouri.	Virginia.
Illinois.	Montana.	West Virginia.
Iowa.	Nevada.	Wyoming.
Kansas.	North Dakota.	
Kentucky.	Ohio.	

The entire population is prescribed as the basis of apportionment of members of one branch only of the Legislature in five States, as follows:

New Hampshire. — The number of inhabitants is taken as the basis of representation in the apportionment of Representa-

[1] Population is prescribed as the basis of representation in the case of Representatives only.

[2] The number of inhabitants, for purposes of apportionment, shall be determined by State enumeration, if the Federal census is not "full and satisfactory."

[3] Apportionments may be made more frequently than once in ten years, should the Legislature provide for State enumerations.

[4] The population for purposes of apportionment shall be determined by State census, if the Federal census "be not taken or is delayed."

[5] An enumeration shall be made every tenth year, but the General Assembly may adopt "the immediately preceding United States census as a true and correct enumeration."

[6] The population as determined by the Federal census, or by a State census taken for the purpose of apportionment, is prescribed as the basis of representation in the case of Senators only.

tives; but the number of Senators is fixed at twenty-four, each Senator representing a single district, and the division of the State into districts "from time to time" is based on the "proportion of direct taxes paid."

New Jersey. — Population is prescribed as the basis of representation in the case of Representatives, and the Senate consists of one Senator from each county.

Rhode Island. — Population is prescribed as the basis of representation in the case of Representatives, and the Senate consists of the Lieutenant-Governor and one Senator from each county.

Texas. — Population is prescribed as the basis of representation in the case of Representatives, and the "number of qualified electors" in the case of Senators.

Vermont. — Population is prescribed as the basis of representation in the case of Senators, and the House of Representatives consists of one Representative from each inhabited town.

2. *Prescribed Portion of Population.*

In fourteen States the basis of apportionment is a definite, limited portion of the population, as follows:

Arkansas. — Adult male inhabitants.

California. — Population, except persons not eligible to become naturalized citizens.

Indiana. — Male inhabitants above twenty-one years of age.

Maine. — Number of inhabitants, exclusive of foreigners not naturalized and Indians not taxed.

Massachusetts. — Legal voters.

Minnesota. — Population, exclusive of Indians not taxed.

Nebraska. — Number of inhabitants, excluding Indians not taxed, and soldiers and sailors of the United States army and navy.

New York. — Number of inhabitants, excluding aliens.

North Carolina. — Number of inhabitants, excluding aliens and Indians not taxed.

Oregon. — White population.

South Dakota. — Number of inhabitants, excluding Indians not taxed, and soldiers and sailors of the United States army and navy.

Tennessee. — Number of qualified voters.

Washington. — Number of inhabitants, excluding Indians not taxed, and soldiers and sailors of the United States army and navy.

Wisconsin. — Number of inhabitants, excluding Indians not taxed, and soldiers and sailors of the United States army and navy.

Of the fourteen States above enumerated, seven (Maine, Minnesota, Nebraska, North Carolina, South Dakota, Washington, and Wisconsin) specifically exclude "Indians not taxed" from representation; six (California, Maine, Massachusetts, New York, North Carolina, and Tennessee) either specifically or by more general limitation exclude aliens; four (Nebraska, South Dakota, Washington, and Wisconsin) specifically exclude "soldiers and sailors of the United States army and navy" in addition to "Indians not taxed." In Arkansas representation is limited to "adult male inhabitants," in Indiana to "male inhabitants above twenty-one years of age," in Massachusetts to "legal voters," and in Oregon to the "white population."

3. *Apportionment prescribed in the Constitution.*

In the four remaining States, not already considered, the legislative districts are specifically defined in the Constitution. A brief statement with reference to the apportionment in each of these four States follows:

Arizona. — Until otherwise provided by law the Senate shall consist of nineteen members and the House of Representatives of thirty-five members. The Constitution prescribes a definite apportionment of Senators and Representatives among the several counties.

Delaware. — The House of Representatives is composed of thirty-five members and the Senate of seventeen members, and the State is divided into Representative and Senate districts, the boundaries of which are defined in the Constitution.

Idaho. — The Senate consists of one member from each county, and the House of Representatives consists of not more than three times the number of Senators, the Representatives being chosen by the electors of the respective counties or districts into which the State "may from time to time be divided by law."

New Mexico. — Representation of Senate and Representative districts is to remain as at present prescribed in the Constitution until the first session after the publication of the Federal census of 1920; then and thereafter representation shall be based on the population.

III. The Frequency of Reapportionment.

Every Ten Years. — In the twenty-eight States enumerated below provision is made in the Constitution for a reapportionment of one or both branches of the Legislature every ten years.

Alabama.
California.
Connecticut.
Florida.
Georgia.
Illinois.
Kentucky.
Louisiana.
Maine.
Maryland.[1]
Massachusetts.
Michigan.
Mississippi.[2]
Missouri.
New Jersey.
New Mexico.[3]
New York.
North Carolina.
Ohio.
Oklahoma.
Pennsylvania.
South Carolina.
Tennessee.
Texas.
Vermont.
Virginia.
West Virginia.
Wisconsin.

Every Five Years. — In the fifteen States enumerated below provision is made in the Constitution for a reapportionment of one or both branches of the Legislature every five years.

Colorado.
Iowa.
Kansas.
Minnesota.
Montana.
Nebraska.
Nevada.
New Hampshire.
North Dakota.
Oregon.
Rhode Island.
South Dakota.
Utah.
Washington.
Wyoming.

Every Six Years. — In Indiana provision is made for a reapportionment to be based on an enumeration every sixth year of "all male inhabitants over the age of twenty-one years."

Intervals not Stated. — In Arkansas and Idaho no provision

[1] More frequent apportionments may be made if provided by the Legislature.

[2] Optional. The Constitution provides that "the Legislature may, at the first session after the Federal census of 1900, and decennially thereafter, make a new apportionment of Senators and Representatives."

[3] Representation by districts shall remain as at present prescribed in the Constitution until the first session after the publication of the Federal census of 1920; then and thereafter representation shall be based on population.

is made for the reapportionment of representation at stated intervals of time, the Legislature merely being empowered to make a reapportionment "from time to time." In Arizona the apportionment prescribed in the Constitution is to continue unchanged "until otherwise provided by law," and in Delaware no provision is made for a reapportionment at any time.

IV. Titles of Legislative Districts.

1. The First Branch.

The titles of the districts represented by members of the "First Branch" or "Upper Branch" of the Legislature in the several States are as follows:

Senatorial Districts (30 States). — Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wyoming.

Counties (8 States). — Arizona, Idaho, Kansas, Mississippi, New Jersey, Ohio, South Carolina, Vermont.

Senate Districts (4 States). — New York, North Carolina, Texas, Wisconsin.

Counties and Districts. — Nevada, Oregon, Tennessee.

Counties and Legislative Districts. — Maryland.

Counties and Senatorial Districts. — Missouri.

Towns and Cities. — Rhode Island.

2. The Second Branch.

The titles of the districts represented by the "Second Branch" or "Lower Branch" of the Legislature in the several States are as follows:

Representative Districts (15 States). — Colorado, Delaware, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Mexico, South Dakota, Utah, Washington, Wyoming.

Counties (12 States). — Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Mississippi, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina.

Counties and Districts (8 States). — Idaho, Maryland, Missouri, Nevada, Oregon, Pennsylvania, Tennessee, Texas.

Senatorial Districts.[1] — Illinois, North Dakota.

Towns. — Connecticut, Vermont.

Assembly Districts. — California, Wisconsin.

Counties and Assembly Districts. — New York.

Counties and Delegate Districts. — West Virginia.

House Districts. — Virginia.

Parishes. — Louisiana.

Towns and Districts. — Maine.

Towns and City Wards. — New Hampshire.

Towns, Cities and Representative Districts. — Rhode Island.

V. Membership of Each Branch of the Legislature.

By specific provision the number of members of one or both branches of the Legislature is prescribed in the Constitution of nearly all of the States. The method, however, is by no means uniform and it therefore seems advisable to discuss the two branches of the Legislature separately.

1. The First Branch.

In nineteen States a definite number of members is prescribed; in seven States a maximum and a minimum number; in eight States a maximum number only; in one State a minimum number only; in four States the first branch consists of one member from each county; in three States no limit whatever is prescribed; and in six States (to be discussed separately) varying methods of determining the number are prescribed. The maximum number of members of the first branch prescribed in any State is fifty-one (in Illinois) and the smallest number seventeen (in Delaware). The States classified according to the method of determining the number of members of the upper branch are as follows:

Definite Number. — Arizona, California, Colorado, Delaware, Georgia, Illinois, Iowa, Kentucky, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Texas, Vermont.

Maximum and Minimum Number. — Arkansas, Louisiana, Maine, Mississippi, North Dakota, South Dakota, Virginia.

[1] Representatives are apportioned to and elected in each senatorial district.

Maximum Number Only. — Alabama, Florida, Indiana, Kansas, Nebraska, Oregon, Tennessee, Utah.

Minimum Number Only. — West Virginia.

One Member for Each County. — Idaho, Maryland, New Jersey, South Carolina.

Number not Limited. — Connecticut, Montana, Wyoming.

Other Methods. — Minnesota: Maximum, one member for every 5,000 inhabitants.

Nevada: Aggregate number of members of both branches never to exceed 75.

Ohio: "Ratio" ascertained by dividing the population by 35.

Rhode Island: Lieutenant-Governor and one member from each city or town.

Washington: Not more than one-half or less than one-third of the number of Representatives.

Wisconsin: Not more than one-third or less than one-fourth of the number of members of the Assembly.

2. *The Second Branch.*

By constitutional provision the number of members of the second branch of the Legislature is limited in twelve States to a definite number; in fifteen States a maximum number only is prescribed; in nine States both a maximum and a minimum number are prescribed; in three States the number is not limited; and in nine States other methods of fixing the number are prescribed. The maximum number of members of the second branch prescribed in any State is 240 (in Massachusetts), and the minimum number 24 (in Connecticut). The States classified according to the method of limiting the number of members of the second branch are as follows:

Definite Number. — Arizona, California, Colorado, Delaware, Illinois, Kentucky, Maine, Massachusetts, New Mexico, New York, North Carolina, South Carolina.

Maximum Number Only. — Alabama, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Nebraska, New Jersey, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah.

Maximum and Minimum Number. — Arkansas, Connecticut, Michigan, Mississippi, North Dakota, South Dakota, Virginia, Washington, Wisconsin.

Number not Limited. — Maryland, Montana, New Hampshire.

Other Methods. — Idaho: Not more than three times the number of Senators.

Minnesota: Maximum, one for every 2,000 inhabitants.

Missouri: Determined by the number of "ratios" in each county.

Nevada: Aggregate number of members of both branches never to exceed 75.

Ohio: "Ratio" obtained by dividing the population by 100.

Pennsylvania: "Ratio" obtained by dividing the population by 200.

Vermont: One for each inhabited town.

West Virginia: Definite number established, but may be increased in accordance with prescribed rules.

Wyoming: Never less than twice nor more than three times the number of Senators.

VI. Apportionment in Massachusetts.

1. The House of Representatives.

Since the formation of the State government under the Constitution of 1780, there have been three different methods of determining the membership of the House of Representatives, namely, in accordance with (1) the number of ratable polls, (2) the number of inhabitants, and (3) the number of legal voters.

Ratable Polls. — This was the basis of representation from 1780 to 1840, the unit being originally fixed by Chapter 1, Section III, Article I, of Part the Second of the Constitution, and each town, down to 1838, being apparently left to determine for itself the number of representatives to which it might be thus entitled in accordance with the number of ratable polls returned by the assessors; while from 1838 to 1840, inclusive, under Article XII of the Amendments, representation was determined in accordance with an apportionment by the Governor and Council upon the basis of a census of ratable polls taken as of May 1, 1837.

Under this system, which had numerous defects not necessary to enumerate here, the membership fluctuated greatly; *e.g.*, the first house to assemble after the adoption of the Constitution had 296 members; that of 1782 had only 131; in 1812, there were 748 members; in 1818, the membership dropped to 223;

and in 1819 it was 402. The Constitutional Convention of 1820 made an earnest effort to change the basis of representation in the House from ratable polls to inhabitants, apparently with a view to making the system more essentially democratic and at the same time establishing a more stable membership in point of size. These efforts, however, came to naught, the people rejecting the amendment intended to effect the proposed change by a vote of 9,904 yeas to 20,729 nays. The conditions which had hitherto prevailed accordingly continued, except that with respect to the size of the membership, they seem to have been aggravated, for while the average membership for the years 1780 to 1820, inclusive, was 322, it was 415 for the period 1821–1837. In 1835, accordingly, another attempt at reform was made, and Article XII was brought forward, being adopted by the Legislatures of that year and of 1836 and being approved and ratified by the people November 14, 1836. This amendment made no change in the basis of representation, ratable polls being continued, but the number of such persons was to be ascertained by means of what was for the first time styled a "census," which was to be taken as of the first day of May 1837, and in every tenth year thereafter, and the number thus ascertained was to be used in determining the representation in the House for a period of ten years, the Governor and Council being charged with the duty of ascertaining the number of representatives to which each city and town should be entitled. The new method of apportionment provided by the Twelfth Amendment differed from the old in detail rather than principle, but being based upon a definite rule fixed in advance, it was doubtless hoped it would regulate somewhat more systematically than had hitherto been possible the fluctuations in the membership and promote a reduction of the maximum number, which had apparently come to be recognized as too large and cumbersome. The result in this respect, however, was disappointing. The first House to be chosen under the new arrangement, that of 1838, consisted of 480 members and that of 1839 had 522. This amendment, accordingly, remained in force for only one year, when the public men of the time undertook to make another adjustment by proposing in the Legislature of 1839 what became the Thirteenth Amendment.

Inhabitants. — From 1840 to 1857, under Article XIII of the Amendments, the basis of representation was the number of inhabitants as determined by a census taken as of the first day of May, 1840, and every tenth year thereafter, the Governor and Council, in accordance with a formula prescribed by the Amendment, apportioning the number of representatives which each city and town, or representative district composed of two or more towns, should be entitled to elect.

Article XIII was adopted by the Legislatures of 1839 and 1840 and approved and ratified at the polls April 6, 1840 (yeas, 24,884; nays, 4,912), the people thus reversing the position they had taken on this subject in 1820. In substituting inhabitants for ratable polls as the basis of representation, it made a radical change in the character of the unit which had remained unaltered for sixty years. But the framers of the Thirteenth Amendment were not yet disposed to adopt the principle of a definite number of members for the House which should be permanent, such as had been recognized from the beginning as respected the Senate. In other words, it was apparently still felt that the proper remedy for the growing inconvenience of a cumbersome membership in the House was to effect a decrease in the total number, or at least to retard the rate of increase, by the method of increasing the basis of apportionment rather than by fixing definitely the size of the body. The first session to be affected by the operation of this amendment following the population census taken as of May 1, 1840, and in accordance with the schedule of apportionment made by the Council on July 23 following, was that of 1841, when the membership dropped to 397 (it was 518 in 1840). For the ten-year period which ensued before the apportionment following the census of 1850 became operative, the average membership was 303. The House of 1852 contained 402 members; and although it dropped to 288 in 1853, the Constitutional Convention which met in that year evidently felt that the time was ripe for another readjustment. Accordingly, in drawing up the new frame of government, which it was decided to submit to the people, while provision was made for retaining inhabitants as the unit of representation, the number of inhabitants entitled to representation in the several towns and districts was changed,

probably for the same reason that influenced the adoption of the Twelfth and Thirteenth Amendments, namely, to secure a more stable total membership; and it was further provided that the apportionment of the number of Representatives to which each town and city should be entitled should be made at its first session next after each decennial State census by the Senate instead of by the Governor and Council. These provisions, embodied in Chapter 3 of the proposed new form of government, formed a part of Proposition No. 1, which, together with seven other propositions, the Convention voted to submit to the people for their approval. All of the eight propositions were defeated at the polls, the vote on No. 1 being Yeas, 63,222; Nays, 68,150. Three years later, however, in the Legislature of 1856, another suggestion for determining the membership of the House was brought forward and embodied in what became Article XXI of the Amendments.

Legal Voters. — By the provisions of Article XXI of the Amendments, the apportionment of Representatives was to be determined by an enumeration of the legal voters of each city and town on the first day of May in the year 1857 and by subsequent special enumerations in the year 1865 and every tenth year thereafter, taken in conjunction with the decennial censuses of population which were at the same time provided for. The House of Representatives was to consist for the first time of a definite fixed number of members, namely, 240, which were to be apportioned by the Legislature, at its first session after the return of each enumeration, to the several counties of the Commonwealth equally, as nearly as might be, according to their relative numbers of legal voters; the county commissioners of the several counties, or such board of special commissioners in each county as might be provided for the purpose by law, being charged with the duty of dividing their respective counties into Representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as possible, according to the relative number of legal voters of the several districts. This amendment, the provisions of which are still operative, was adopted by the Legislatures of 1856 and 1857, and was ratified and approved by the people on May 1, 1857, by a vote of 31,277 yeas and 6,282 nays. Its full text is as follows:

A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the Secretary of the Commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid, a special enumeration shall be made of the legal voters; and in each city, said enumeration shall specify the number of such legal voters aforesaid, residing in each ward of such city. The enumeration aforesaid shall determine the apportionment of representatives for the periods between the taking of the census.

The House of Representatives shall consist of two hundred and forty members, which shall be apportioned by the Legislature, at its first session after the return of each enumeration as aforesaid, to the several counties of the Commonwealth, equally, as nearly as may be, according to their relative numbers of legal voters, as ascertained by the next preceding special enumeration; and the town of Cohasset, in the county of Norfolk, shall, for this purpose, as well as in the formation of districts, as hereinafter provided, be considered a part of the county of Plymouth; and it shall be the duty of the Secretary of the Commonwealth to certify, as soon as may be after it is determined by the Legislature, the number of representatives to which each county shall be entitled, to the board authorized to divide each county into representative districts. The mayor and aldermen of the city of Boston, the county commissioners of other counties than Suffolk, — or in lieu of the mayor and aldermen of the city of Boston, or of the county commissioners in each county other than Suffolk, such board of special commissioners in each county, to be elected by the people of the county, or of the towns therein, as may for that purpose be provided by law, — shall, on the first Tuesday of August next after each assignment of representatives to each county, assemble at a shire town of their respective counties, and proceed, as soon as may be, to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the relative number of legal voters in the several districts of each county; and such districts shall be so formed that no town or ward of a city shall be divided therefor, nor shall any district be made which shall be entitled to elect more than three representatives. Every representative, for one year at least next preceding his election, shall have been an inhabitant of the district for which he is chosen and shall cease to represent such district when he shall cease to be an inhabitant of the Commonwealth. The districts in each county shall be numbered by the board creating the same, and a description of each, with the numbers thereof and the number of legal voters therein, shall be returned by the board, to the Secretary of the Commonwealth, the county treasurer of each county, and to the clerk of every town in each district,

to be filed and kept in their respective offices. The manner of calling and conducting the meetings for the choice of representatives, and of ascertaining their election, shall be prescribed by law.

2. The Senate and the Council.

The bases of apportionment for determining the membership of the upper branch of the Legislature and of the Executive Council have always been so closely related as to make it necessary to consider them jointly. By a peculiar provision of the Constitution of 1780 (Chapter 1, Section II, Article I, Part the Second), for a period of sixty years from its adoption, there was no discrimination in the voting as between the Senate and the Council. That is, there were to be annually elected by "the freeholders and other inhabitants" forty persons "to be called counsellors and senators" from districts into which the Commonwealth might from time to time be divided by the General Court for the purpose; and the General Court, in assigning the numbers to be elected by the respective districts, was to be governed "by the proportion of the public taxes paid by the said districts." Since the voters were not privileged to indicate which of the persons to be chosen "counsellors and senators" were to serve as Councillors and which as Senators, it was provided that the ultimate division of those elected into the two groups should be made by joint ballot of the "Senators" (*sic*, the entire forty) and the Representatives, nine of the forty being chosen as Councillors. It thus appears that the Senate was to consist of thirty-one members, while the Council was to consist of the nine persons selected in the manner described, and the Lieutenant-Governor.

By the Thirteenth Article of Amendment, approved and ratified April 6, 1840, the cumbersome method of determining the membership of the Senate by eliminating from the whole number of persons chosen without distinction to be "counsellors and senators," nine of whom were to be designated as Councillors, leaving a Senate of thirty-one, was abandoned, the amendment providing that there should be a Senate of forty members, and, in addition, nine Councillors to be chosen from among the people at large by joint ballot of the Senators and the Representatives. This amendment not only, as has been

noted, substituted inhabitants as the basis of representation in the House instead of ratable polls, but eliminated the provision for apportioning the Senators among the several districts on the basis of the "proportion of public taxes paid by the districts"; and it was provided that "no possession of a freehold or of any other estate" should be required as a qualification for holding a seat in the legislative body or the Executive Council. The article continued: —

> The Legislature, at its first session after this amendment shall have been adopted, and at its first session after the next State census shall have been taken, and at its first session after each decennial State census thereafterwards, shall divide the Commonwealth into eight districts of contiguous territory, each containing a number of inhabitants as nearly equal as practicable, without dividing any town or ward of a city, and each entitled to elect one councillor; *provided, however*, that if, at any time, the Constitution shall provide for the division of the Commonwealth into forty senatorial districts, then the Legislature shall so arrange the councillor districts, that each district shall consist of five contiguous senatorial districts, as they shall be, from time to time, established by the Legislature. . . .

The apportionment of Senators as well as Representatives under the Thirteenth Amendment was thus to be determined by the Governor and Council for a period of ten years in accordance with the number of inhabitants as ascertained by a census on the first day of May of the year 1840 and of every tenth year thereafter, and the several Senate districts then existing were to be permanent, but each district was to have at least one Senator. To this task — the census, as thus provided for, having been duly taken under an enabling act[1] — the Council dutifully applied itself and, each county being taken as a Senate district, assigned the forty Senators to the several counties.

It will be observed that the sponsors of the Thirteenth Amendment were not yet ready to take the position that the members of the Council should be elected directly by the people, and their selection still remained vested in the legislative body. It was not until the adoption, fifteen years later on May 23, 1855, of the Sixteenth Article of Amendment that the process of

[1] *Acts of 1840*, Chapter 68, approved March 21, 1840.

democratizing the executive branch of the government was completed by the provision that the Councillors (who by this Amendment were reduced to eight in number) were to be annually chosen by the inhabitants of the Commonwealth qualified to vote for Governor.

The provision in the Sixteenth Amendment for the contingency of some future constitutional requirement that the Commonwealth be divided into forty senatorial districts — each to elect a Senator — did not become operative until the adoption of the Twenty-second Article of Amendment, so that the thirteen Counties (Dukes and Nantucket being counted as one) continued in the meantime each to constitute a senatorial district, the several Senators to which each county might be entitled under the apportionment of the Council being elected by the voters at large within the respective counties. The full text of this Amendment, ratified and approved by the people on May 1, 1857, by a vote of 32,971 yeas and 4,342 nays, and the provisions of which are still operative, is as follows:

A census of the legal voters of each city and town, on the first day of May shall be taken and returned into the office of the secretary of the commonwealth, on or before the last day of June, in the year one thousand eight hundred fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid, a special enumeration shall be made of the legal voters, and in each city said enumeration shall specify the number of such legal voters aforesaid, residing in each ward of such city. The enumeration aforesaid shall determine the apportionment of senators for the periods between the taking of the census. The senate shall consist of forty members. The general court shall, at its first session after each next preceding special enumeration, divide the commonwealth into forty districts of adjacent territory, each district to contain, as nearly as may be, an equal number of legal voters, according to the enumeration aforesaid: *provided*, *however*, that no town or ward of a city shall be divided therefor; and such districts shall be formed, as nearly as may be, without uniting two counties, or parts of two or more counties, into one district. Each district shall elect one senator, who shall have been an inhabitant of this commonwealth five years at least immediately preceding his election, and at the time of his election shall be an inhabitant of the district for which he is chosen; and he shall cease to represent such senatorial district when he shall cease to be an inhabitant of the commonwealth.

APPENDIX.

TABULAR SURVEY OF THE APPORTIONMENT OF REPRESENTATION IN THE SEVERAL STATES.

STATE.	Basis of Representation.	Population determined by Federal or State Census or Enumeration.	Frequency of Reapportionment.	TITLES OF LEGISLATIVE DISTRICTS.		NUMBER OF MEMBERS, IF PRESCRIBED.	
				First Branch.	Second Branch.	First Branch.	Second Branch.
1. Alabama, . .	"Number of inhabitants," . . .	Federal or State.[1]	Every 10 years.	Senatorial districts.	Counties.	Max. 35.[2]	Max. 105.[3]
2. Arizona, . .	Representation of each county, prescribed.[4]	–[5]	–[5]	Counties.	Counties.	19[4]	35[4]
3. Arkansas, . .	"Adult male inhabitants," . . .	Federal or State.	"From time to time."	Senatorial districts.	Counties.	Max. 35; min. 30.	Max. 100; min. 73.
4. California, . .	"Population, except persons not eligible to become naturalized citizens."	Federal.	Every 10 years.	Senatorial districts.	Assembly districts.	40	80
5. Colorado, . .	"Enumeration of inhabitants," . .	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	26	49
6. Connecticut, .	Population, ...	Federal.	Every 10 years.	Senatorial districts.	Towns.	–[5]	Max. 36; min. 24.
7. Delaware, . .	Representation of each county, prescribed.	–[5]	–[5]	Senatorial districts.	Representative districts.	17	35
8. Florida, . .	Population, ...	State.[6]	Every 10 years.	Senatorial districts.	Counties.	Max. 32.	Max. 68.

[1] Apportionment to be based on the State enumeration, if the Federal census is not full and satisfactory.

[2] Maximum number of Senators, 35, and not less than one-fourth nor more than one-third the number of Representatives.

[3] Maximum not to be more than 105 unless new counties shall be created, in which event each new county shall be entitled to one Representative.

[4] Until otherwise provided by law.

[5] Not prescribed.

[6] Provision is made for "an enumeration of all the inhabitants of the State by counties for the year 1895, and every ten years thereafter."

TABULAR SURVEY OF THE APPORTIONMENT OF REPRESENTATION IN THE SEVERAL STATES — CONTINUED.

STATE.	Basis of Representation.	Population determined by Federal or State Census or Enumeration.	Frequency of Reapportionment.	TITLES OF LEGISLATIVE DISTRICTS.		NUMBER OF MEMBERS, IF PRESCRIBED.	
				First Branch.	Second Branch.	First Branch.	Second Branch.
9. Georgia,	Population,	Federal.	Every 10 years.	Senatorial districts.	Counties.	44	Max. 189.
10. Idaho,	One Senator from each county; Representatives, as provided by law.	—[1]	"From time to time."	Counties.	Counties or districts.	—[2]	—[2]
11. Illinois,	Population,	Federal.	Every 10 years.	Senatorial districts.	Senatorial districts.[3]	51	153[3]
12. Indiana,	"Male inhabitants, above twenty-one years of age."	State.[4]	Every 6 years.[4]	Senatorial districts.	Representative districts.	Max. 50.	Max. 100.
13. Iowa,	Population,	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	50	Max. 108.
14. Kansas,	"Census of the preceding year,"	Federal and State.	Every 5 years.	Counties.	Counties.	Max. 40.	Max. 125.
15. Kentucky,	Population,	Federal.[5]	Every 10 years.	Senatorial districts.	Representative districts.	38	100
16. Louisiana,	Population,	Federal.	Every 10 years.	Senatorial districts.	Parishes.	Max. 41; min. 36.	Max. 120.
17. Maine,	"Number of inhabitants,"[6]	State.	Every 10 years.[7]	Senatorial districts.	Towns and districts.	Max. 31; min. 20.	151
18. Maryland,	Population,	Federal or State.[8]	Every 10 years.[8]	Counties and Legislative districts.	Counties and Legislative districts.	—[9]	—[1]
19. Massachusetts,	"Legal voters,"	State.	Every 10 years.	Senatorial districts.	Representative districts.	40	240
20. Michigan,	"Number of inhabitants,"	Federal.	Every 10 years.	Senatorial districts.	Representative districts.	32	Max. 100; min. 64.
21. Minnesota,	Population, exclusive of Indians not taxed.	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	Max. — one for every 5,000 inhabitants.	Max. — one for every 2,000 inhabitants.
22. Mississippi,	Population,	Federal,	Every 10 years (Optional).	Counties.	Counties.	Max. 45; min. 30.[10]	Max. 133; min. 100.[10]
23. Missouri,	Number of inhabitants,[11]	Federal or State.[12]	Every 10 years.	Counties and Senatorial districts.	Counties and Representative districts.	34	—[11]
24. Montana,	Population,	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	—[1]	—[1]
25. Nebraska,	Number of inhabitants with certain exceptions.[13]	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	Max. 33.[14]	Max. 100.[14]
26. Nevada,	Population,	Federal and State.	Every 5 years.	Counties and districts.	Counties and districts.	—[15]	—[15]

27. New Hampshire,	Number of inhabitants,[16] . . .	Federal and State.[16]	Every 5 years.	Senatorial districts.	Towns and city wards.	24	-[1]
28. New Jersey, .	Number of inhabitants,[17] . . .	Federal.[17]	Every 10 years.[17]	Counties.	Counties.	One for each county.	Max. 60.
29. New Mexico, .	Representation by districts prescribed,[18]	Federal.[18]	Every 10 years.[18]	Senatorial districts.	Representative districts.	24	49
30. New York, .	Number of inhabitants, excluding aliens.	State.	Every 10 years.	Senate districts.	Counties and Assembly districts.	50[19]	150
31. North Carolina, .	Number of inhabitants, excluding aliens and Indians not taxed.	Federal.	Every 10 years.	Senate districts.	Counties.	50	120
32. North Dakota, .	Number of inhabitants, . . .	Federal and State.	Every 5 years.	Senatorial districts.	Senatorial districts.[20]	Max. 50; min. 30.	Max. 140; min. 60.[20]

[1] Not prescribed.

[2] One Senator from each county; number of Representatives not to exceed three times the number of Senators.

[3] The House of Representatives shall consist of three times the number of members of the Senate, and three Representatives shall be elected in each Senatorial district.

[4] Provision is made for an enumeration every sixth year of all male inhabitants over the age of twenty-one years.

[5] No provision is made in the Constitution for a State enumeration of the population. By "last enumeration" the Federal census presumably is meant.

[6] Apportionment "according to the number of inhabitants;" but provision is made that "the Legislature . . . shall . . . within every . . . period of at most ten years and at least five, cause the number of inhabitants to be ascertained, exclusive of foreigners not naturalized and Indians not taxed."

[7] Senate, every ten years; House of Representatives, "at the several periods of making such enumeration." (See Note 6.)

[8] Apportionments may be made more frequently should the Legislature provide for State enumerations.

[9] One Senator from each county.

[10] Each county shall have at least one Representative, and the counties are grouped into three "Divisions," each of which shall never have less than 44 Representatives except in case of a uniform reduction in the number of Senators and Representatives in each Division, in which case the number of Representatives shall be not less than 100 or more than 133, nor the number of Senators less than 30 or more than 45.

[11] The number of Representatives assigned to each county is determined by the number of "ratios" in such county; the "ratio" is ascertained by dividing the population by 200.

[12] State census, if the Federal census "be not taken, or is delayed."

[13] Excluding Indians not taxed, and soldiers and sailors of the United States Army and Navy.

[14] Number regulated by law, except that maximum is prescribed.

[15] The aggregate number of members of both branches of the Legislature shall never exceed 75, and the number of Senators shall not be less than one-third nor more than one-half of the number of members of the Assembly.

[16] The number of inhabitants is taken as the basis of representation in the apportionment of Representatives, but the number of Senators is fixed at 24, each Senator representing a single district, and the division of the State into districts "from time to time" is based on the "proportion of direct taxes" paid.

[17] Population is prescribed as the basis of representation in the case of Representatives, and the Senate consists of one Senator from each county.

[18] To remain as at present prescribed by law until the first session after the publication of the Federal census of 1920; then and thereafter to be based upon population.

[19] May be temporarily increased under certain conditions.

[20] Representatives are apportioned to and elected at large in each Senatorial district. The number of Representatives is fixed by law.

TABULAR SURVEY OF THE APPORTIONMENT OF REPRESENTATION IN THE SEVERAL STATES — CONCLUDED.

State.	Basis of Representation.	Population determined by Federal or State Census or Enumeration.	Frequency of Reapportionment.	Titles of Legislative Districts.		Number of Members, if prescribed.	
				First Branch.	Second Branch.	First Branch.	Second Branch.
33. Ohio,	Population,	Federal.	Every 10 years.	Counties.	Counties.	—[1]	—[1]
34. Oklahoma,	Number of inhabitants,	Federal.[2]	Every 10 years.	Senatorial districts.	Counties.	44	Max. 109.[3]
35. Oregon,	White population,	Federal and State.	Every 5 years.	Counties and districts.	Counties and districts.	Max. 30.[4]	Max. 60.[4]
36. Pennsylvania,	Population,	Federal.	Every 10 years.	Senatorial districts.	Counties and Representative districts.	50	—[5]
37. Rhode Island,	Population,[6]	Federal and State.[6]	Every 5 years (Optional).[6]	Towns and cities.	Towns, cities and Representative districts.	—[6]	Max. 100.
38. South Carolina,	Number of inhabitants,	State or Federal.[7]	Every 10 years.	Counties.	Counties.	—[8]	124
39. South Dakota,	Number of inhabitants with certain exceptions.[9]	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	Max. 45; min. 25.	Max. 135; min. 75.
40. Tennessee,	Number of qualified voters,	State.	Every 10 years.	Counties and Districts.	Counties and Districts.	Max. 33.[10]	Max. 99.[11]
41. Texas,	Population,[12]	Federal.[12]	Every 10 years.[12]	Senate districts.	Counties and Representative districts.	31	Max. 150.
42. Utah,	Population,	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	Max. 30.[13]	Max. 90.[13]
43. Vermont,	Population,[14]	Federal or State.[14]	Every 10 years.[14]	Counties.	Towns.	30	—[14]
44. Virginia,	Population,[15]	Federal.[15]	Every 10 years.[15]	Senatorial districts.	House districts.	Max. 40; min. 33.	Max. 100; min. 90.
45. Washington,	Number of inhabitants with certain exceptions.[9]	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	—[16]	Max. 99; min. 63.
46. West Virginia,	Population,	Federal.	Every 10 years.	Senatorial districts.	Counties and Delegate districts.[17]	—[18]	Min. 65.[19]

47. Wisconsin, . .	Number of inhabitants with certain exceptions.[9]	Federal.	Every 10 years.	Senate districts.	Assembly districts.	-[20]	Max. 100; min. 54.
48. Wyoming, . .	Number of inhabitants, . . .	Federal and State.	Every 5 years.	Senatorial districts.	Representative districts.	-[21]	-[21]

[1] No stated number of Senators or Representatives is prescribed. The "ratio" is ascertained by dividing population by 35 in apportioning Senators, and by 100 in apportioning Representatives.

[2] Or in such manner as the Legislature may direct.

[3] Until otherwise provided by law. The "ratio" is ascertained by dividing the population by 100.

[4] Number fixed by law, but as near as may be the same proportion of Senators to Representatives must be maintained.

[5] Representatives are apportioned to the several counties and Representative districts on the basis of ratios of population therein, and the "ratio" is ascertained by dividing the population by 200.

[6] Population is prescribed as the basis of representation in the case of Representatives. The Senate consists of the Lieutenant-Governor and one Senator from each city or town.

[7] An enumeration shall be made every tenth year, but the General Assembly may adopt "the immediately preceding United States Census as a true and correct enumeration."

[8] The number of inhabitants is prescribed as the basis of representation in the case of Representatives; the Senate consists of one Senator from each county.

[9] Excluding Indians not taxed, and soldiers and sailors of the United States Army and Navy.

[10] Never to exceed "one-third the number of Representatives."

[11] Maximum 75 until the population of the State shall equal one million and a half.

[12] Population is prescribed as the basis of representation in the case of Representatives, and the number of qualified electors in the case of Senators.

[13] The Constitution provides that the Senate shall consist of 18 members and the House of Representatives of 45 members, but the Legislature may increase the number in each case, provided the number of Senators shall not exceed 30 and the number of Representatives shall never be less than twice nor more than three times the number of Senators.

[14] Population as determined by the Federal census or by a State census taken for the purpose of apportionment is prescribed as the basis of representation in the case of Senators; the House of Representatives consists of one Representative for each inhabited town.

[15] Provision is made for an apportionment of the State into Senatorial and House districts in 1912 and every tenth year thereafter, and presumably the Federal census is taken as the basis of apportionment.

[16] The number is not prescribed, but the number of Senators may not be more than one-half nor less than one-third the number of Representatives.

[17] Since 1901 there have been no Delegate districts; each county has at least one Delegate.

[18] Provision was made for the division of the State into 12 Senatorial districts, which number might be increased but not diminished. Each district was entitled to two Senators. By the provisions of the reapportionment act of 1901 the number of Senatorial districts was increased to 15, making the number of Senators then 30.

[19] The House of Delegates shall consist of 65 members, but the number may be increased in accordance with certain prescribed rules.

[20] The Senate shall consist of not more than one-third or less than one-fourth of the number of members of the Assembly.

[21] The number is not prescribed, but at no time shall the number of Representatives be less than twice or more than three times the number of Senators.

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BULLETIN No. 30

THE ENGLISH SYSTEM OF PROVISIONAL ORDERS

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THE ENGLISH SYSTEM OF PROVISIONAL ORDERS.

I. History and Definition.

Central control over local authorities in Great Britain is in considerable measure exercised by the issue of what are termed "provisional orders." These orders are issued by various administrative departments or boards of the national government on matters within their respective fields of jurisdiction as fixed by statute. The purpose of the plan is two-fold, namely, to relieve Parliament from the necessity of considering a host of applications for special legislation and to permit greater flexibility in the relations of the central to the local authorities.

Until the adoption of this system it was the custom in Great Britain to grant powers to the various areas of local government (counties, boroughs and parishes) by general law or by special statute, just as in this country. As the administrative needs of local governments increased, however, the requests for special legislation on behalf of individual communities (private bills, they are called in England) became very numerous and placed a heavy burden upon the time of Parliament. Hence the growth of a policy whereby general authority has been vested in various central boards and departments (such as the Local Government Board, The Board of Trade and the Home Office) permitting them within certain broad limits to grant enabling powers by "provisional orders".

A provisional order may, accordingly, be defined as "an ordinance made by a department of the government which acquires the force of law either automatically after a fixed period . . . or by the express confirmation of Parliament itself. . . ." [1]

[1] Redlich and Hirst, *Local Government in England*, II, 254.

II. General Procedure on Provisional Orders.

Legislation passed by Parliament with reference to local affairs is usually drawn in broad terms and in many cases made permissive. This is particularly true of laws which confer powers upon municipalities. In such laws, however, it has become more and more usual to insert a clause providing that any municipality which desires to exercise such permissive power must first secure by provisional order the approval of the Local Government Board, or the Board of Trade or the Home Office, as the case may be. If, for example, an English municipality wishes to borrow money or to engage in any form of public service enterprise it ordinarily applies for a provisional order, not for a special act as in this country. When an application for a provisional order is made on behalf of any local authority an enquiry or hearing is held by an inspector of the central board. This is arranged by sending the officer to the municipality concerned; upon his report and with the information obtained by him the order is then issued or refused.

In some cases the orders issued by the various administrative authorities are final but in other cases the statutes require that provisional orders shall be laid before the Houses of Parliament and shall not go into effect if either of them passes a resolution of disapproval within a certain prescribed period.[1] It is difficult to draw any definite line between those matters in which the action of the administrative authorities is final and those that must be laid before Parliament, because the procedure in any instance depends upon the subject matter of the provisional order, upon the statute under which it is granted, and upon the question as to whether or not the order is opposed. Some of the provisional orders which are required to be laid before Parliament whether opposed or not are those granted by the Board of Trade to railways for raising capital, in regard to working agreements and other matters. Among the orders that must be submitted to Parliament, if opposed, are those issued by the Local Government Board granting charters to boroughs, changing boundaries of parishes, providing dwellings for the working classes and so on.[2]

[1] Lowell, *The Government of England*, I, 383–384. See also May, *Law and Usage of Parliament*, (10th edition. London, 1893.), 677–678.

[2] Lowell, *The Government of England*, I, 383–384.

As a general practice, however, it may be said that provisional orders conferring important powers must be submitted to Parliament for formal ratification. Every year such of the provisional orders as are thus submitted are grouped together into a series of consolidated measures known as Provisional Orders Confirmation Acts and passed through the usual stages like other private bills.[1] They may be amended or rejected at the discretion of Parliament; but as a matter of fact it is rare that any provisional order is stricken from one of these bills in Parliament. During the last forty years, for example, nearly four thousand provisional orders have been issued by the Local Government Board and of these only about thirty-five, or less than one per cent., have been rejected by Parliament.[2]

III. Who may issue Provisional Orders.

The right to issue provisional orders is vested in several of the national boards and departments the most important of which are the Local Government Board, The Board of Trade, The Home Office, The Board of Agriculture and the Board of Education.

1. *The Local Government Board.*

The Local Government Board has jurisdiction in many matters relating to county and borough (city) government, particularly in matters of finance. It is made up of a President, who is a member of the Ministry, and certain ex-officio members who in actual practice take no part in the work of the Board. The President acts alone, assisted in an advisory way by subordinate officials who are experts and under civil service rules.[3]

Functions in Regard to Poor Relief, Public Health and Sanitation. — The Local Government Board is the central agency for the enforcement of the Poor Law, and of the various acts of Parliament relating to public health and sanitation. With reference to the system of public poor relief the Board has

[1] For the procedure on provisional orders see Lowell, *The Government of England*, rev. ed. I, 384–385. Also Redlich and Hirst, II, 280.

[2] Redlich and Hirst, II, 281; Lowell, I, 385–386.

[3] Redlich and Hirst, II, 242–257; also *The Municipal Year Book of the United Kingdom, 1912*, 3–5.

power to issue regulations to the local poor authorities, and sends inspectors to the various communities to see that such rules are properly enforced.[1] As the central supervising authority in matters relating to public health and sanitation, the Board issues rules for the prevention of epidemics, the inspection of milk supplies, etc., and may even require a municipality to provide a public water supply, improve its sewerage system, appoint medical officers and so on.[2] By provisional orders the Board may also change the boundaries of boroughs, and provide for the consolidation and annexation of territory.[3]

Advisory Functions. — The Local Government Board also acts in an advisory capacity to the local authorities and to Parliament by furnishing expert information on questions dealing with municipal administration. As a general rule all private bills introduced in Parliament relating to local administration must be referred to the board and its opinion obtained before Parliament can give final consideration to the measure. These recommendations are usually followed and it is more or less difficult to procure the passage of any local legislation on which the Board has made an adverse report.[4]

Control over Local Finances. — Although the above-mentioned functions are of considerable importance, the most far-reaching power of the Local Government Board is its supervision over local finances. This includes (a) the auditing of the accounts of all local authorities except municipal boroughs; and (b) the approval of municipal loans. In England there are no constitutional or statutory "debt limits" as in this country, but such matters are regulated by the Local Government Board. Parliament from time to time has granted wide borrowing powers to municipalities, but has provided that in most cases the borough authorities must obtain permission from this Board in order to exercise such powers. If, for example, a borough wishes to borrow money for the paving of streets, for the erection of public buildings, for the construction or extension of its water works and so on, it must as a general rule obtain a provisional order from the Local Government Board sanctioning the loan.

[1] Redlich and Hirst, II, 258–275.
[2] Redlich and Hirst, II, 276–301.
[3] For statute conferring powers over boundaries see 62–63 Victoria, Chap. 14, Sec. 54.
[4] Lowell, I, 388–389. See also Munro, W. B., *Government of European Cities*, 324–325.

All such applications are carefully examined by the Board's financial experts before they are granted in order to determine the financial condition of the borough and the advisability of incurring debt for the purpose in question. If the request is granted, the Board usually prescribes the term of the loan, the rate of interest, methods of repayment, etc.[1] Municipalities may still obtain permission to borrow by private acts of Parliament, but this process is more difficult and expensive than the system of provisional orders and is made use of only in special cases.

Limitations on Power of Local Government Board. — While the Local Government Board has a wide range of jurisdiction in issuing administrative regulations, it should be borne in mind that its legislative powers are carefully circumscribed in several ways. In the first place the Board may issue orders only upon the express authorization of a statute passed by Parliament. In the second place most of the general rules or orders issued by the Board which are of sufficient importance to be classed as "provisional orders" must be referred to Parliament and receive specific confirmation by statute. Finally any citizen may apply to the High Court of Justice for a writ of certiorari to bring before that court the question as to whether or not the Board has exceeded its authority.[2] It should also be said that the President of the Board is a member of the Ministry and is therefore responsible to the House of Commons for the administration of his department.

2. The Board of Trade.

A second organ of central control over local government in England is the Board of Trade, which has an organization very similar to that of the Local Government Board. The powers of the Board of Trade in relation to local authorities include among other functions the approval of all projects for the municipal ownership and operation of public utilities. If, for instance, the council of an English city proposes to construct a water system, a lighting plant or a street railway, or to

[1] For an account of functions of Local Government Board over municipal borrowing, see Redlich and Hirst, *Local Government in England*, I, 389–394; also *Municipal Year Book of the United Kingdom, 1912*, 3.

[2] Munro, W. B., *Government of European Cities*, 319.

extend its activities in any of these fields, it must either obtain authority by a special act of Parliament or, what is more usual, must procure a provisional order from the Board of Trade granting the necessary permission. Unless the project is a very large one, the council usually makes use of the provisional order system because it is more simple and less expensive than the procedure involved in securing a special act.[1]

3. Other Departments.

Other departments of the central government with power to issue provisional orders are the Home Office, which has a limited right of supervision over local police administration;[2] the Board of Agriculture, with power to prevent the spread of epidemics among cattle and other animals, to provide for the destruction of insects, etc.;[3] and the Board of Education, which has charge of administering the national laws in regard to schools.[4]

IV. Conclusion.

One of the advantages claimed for the system of provisional orders is that it permits flexibility in the central control of local government. Instead of enacting detailed codes which apply rigidly to all municipalities regardless of individual conditions, Parliament may confer broad grants of power upon cities and then provide that permission to exercise such power shall in each case be obtained by a provisional order from one of the administrative departments. In the second place it is maintained that the system relieves Parliament of a large part of the burden of special legislation, thus giving that body more time for the consideration of measures of general concern. Local authorities, of course, may still obtain powers by special acts of Parliament, instead of by provisional orders, but, as stated above, the latter method is generally resorted to except where the matter is of great importance, because the procedure involved in obtaining a provisional order is relatively more simple and less expensive than in the case of a private act.

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[1] For organization and functions of the Board of Trade see Redlich and Hirst, *Local Government in England*, II, 312–314; also Lowell, *The Government of England*, I, 107–110.

[2] Redlich and Hirst, *Local Government in England*, II, 302–312.

[3] *Ibid.*, II, 314–315.

[4] *Ibid.*, II, 316–319.

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BULLETIN No. 31

THE REGULATION OF BILLBOARDS

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THE REGULATION OF BILLBOARDS.

I. The Argument for and against the Billboard.

The use of the billboard as an advertising medium has been constantly increasing during recent years. Every one is aware of the flaring advertisements which adorn the highways of every community. Every vacant plot in a municipality offers a possible location for a new billboard. As a consequence, there has been a growing endeavor to regulate the billboard, especially in the larger cities. Civic authorities, local improvement societies and other organizations have all attempted to deal with this problem, with varying success. The subject has been recently investigated in this Commonwealth by a Commission on the Taxation of Signs, which made a report to the General Court in January, 1915 (House Document No. 1637).

The objections urged against the billboard by those who wish further regulation may be summarized as follows:

1. *Fire Risk.* — Billboards increase the fire risk of any locality, since they are usually constructed in whole or in part of wooden material. This danger is increased by the accumulation of paper and rubbish which is often found behind them.

2. *Wind Hazard.* — Billboards, being often of flimsy construction, are liable to be blown down by a heavy gale, endangering life and property. This is especially true of roof signs.

3. *Sanitary Considerations.* — The space in the rear of billboards serves as a dumping ground for the filth and rubbish of a neighborhood, and accordingly may serve as a breeding place for flies and mosquitoes.

4. *Danger to Morals of the Young.* — Billboards serve as a shelter for immoral practices and often accentuate the "corner nuisance," thus lowering the moral tone of a neighborhood.

5. *Billboards are Unsightly.* — Posters on billboards, though

much improved in design over those of former days, must still be large and startling in order to attract attention. They are for the most part brightly colored and are never designed to harmonize with adjoining boards, which results in an unpleasant contrast of paints and figures. Billboards are constantly constructed in open places where they may shut off a desirable vista from public observation.

6. *Effect upon Real Estate Values.* — The unsightliness of billboards almost invariably results in an impairment of the value of neighboring property, this being especially true in residential districts. Billboard encroachment into a locality of homes is always an offence to the surrounding community.

The arguments advanced in favor of leaving billboards free from any regulation other than that to which all structures are subjected are as follows:

1. *A Legitimate Means of Advertising.* — Publicity is necessary to business and advertising on billboards should be subjected to no regulations other than those which apply to other forms of advertising.

2. *Deprivation of Property without Due Process of Law.* — The privilege of erecting billboards upon private property is often the source of considerable income, which is a total loss if billboards are prohibited or unduly restricted.

3. *Interference with Personal Liberty.* — So long as billboards do not through faults of construction endanger the public safety, there is no reason why the public should interfere with individual freedom of contract or use of private property.

II. Billboard Regulation in Massachusetts Cities.

Massachusetts cities have on the whole been more lenient than those of other States in making effective regulations concerning billboard structures. Boston, for example, imposes relatively few restrictions upon this form of advertising. Here billboard companies may erect, with few exceptions, a billboard of any size upon private property, providing that the billboard is not erected in such a manner as to be unsafe. No permit or license is required and the company pays nothing to the city. The only exception to this is in the case of advertising signs

which are on or overhang public property and on roofs.[1] A sign which projects upon or hangs over a public highway in Boston requires a permit from the Board of Street Commissioners. If such signs are attached to buildings they are subject to the requirements of the Building Law, and if illuminated they must meet with the approval of the Wire Commissioner. A small fee varying according to the projection is charged in the case of signs over ten feet long. Illuminated signs are licensed at one dollar. Projecting signs must be at least ten feet above the sidewalk. Billboards on buildings are subject to the approval of the Buildings Department, which imposes a small sum for their erection. Furthermore, all roof billboards or sky signs are subject to the rules and regulations of the Fire Prevention Commissioner. They must be of noncombustible material, and fastenings must be of iron or steel; ends must not extend nearer to the side walls than three feet, and the lower edge of every roof sign must be at least four feet above the roof.

These regulations, it is clear, deal only with building requirements based mainly upon grounds of public safety. No attempt has been made to prescribe rules regarding the ground location of billboards or the kind of advertisements which appear upon them. Matters of this sort rest entirely with the billboard companies and the private owner.

III. Regulation in Foreign Countries.

Regulation of billboards abroad is far more stringent than in this country, for the reason that the whole basis of the law is different and there are no constitutional limitations to impede action by governmental authorities. General grants of power are given to the local communities to deal with billboards, with the right to make special regulations as they see fit. Billboards, accordingly, have not only been restricted in their location, size and construction, but have also been subjected to heavy taxation which furnishes the city with a considerable source of revenue. Several methods have been tried in various foreign countries for the regulation of billboard advertising and these may be briefly summarized as follows:

[1] See *General Acts, 1915*, ch. 176, "An Act relative to Signs, Awnings and Other Projections in Public Ways."

1. *England.* — In England the local authorities have power to regulate or prohibit as they wish any structure which tends to affect injuriously the beauty of the landscape; and many country districts have in consequence been entirely freed from billboards. In some cities all sky signs have been prohibited, and special rules have been made for London, including a height limitation of twelve feet on all boards. Various fees are charged upon billboards in all English cities.

2. *France.* — France regulates billboards by districting rules, as in England, and also by taxation; and no advertising can be displayed until various strict rules are observed. Most of the advertising in Paris is done on kiosks or round columns; there are a large number of these, used by policemen and newspaper dealers, and this affords space for a great amount of advertising.

3. *Germany.* — In Germany the matter of regulation is left to the States and cities, which have elaborate laws on the subject. Billboards of the ordinary type are prohibited everywhere. In the city of Berlin advertisements must be on pillars, which can be set up for the purpose only with the joint approval of several civic authorities. The privilege of erecting the columns is leased by the city to an advertising concern for a ten-year term. Official notices may be posted free and the columns are also used for various municipal purposes, such as supporting electric lamps, protecting meters, and storing street cleaning utensils. The operating companies pay nearly $100,000 annually to the city of Berlin for their privileges.

4. *Austria.* — There is no tax upon advertisements in Austria, but they must be sanctioned by the press police and receive the permission of the owner of the property on which they are located.

5. *Italy.* — Italy recognizes the right of regulation on æsthetic grounds, and each advertisement to be affixed in a public place must be licensed by the police authorities. All advertisements must bear a revenue stamp.

6. *Belgium.* — In Belgium a stamp tax is levied according to the size of the poster.

7. *Holland.* — The municipalities of Holland erect "communal advertising boards," leasing the space on them for a period of five years.

8. *Switzerland.* — The police authorities of Switzerland define the spots in which advertisements will be allowed and censor all advertising. A tax is levied, varying with the size of the board.

9. *Brazil.* — Rio de Janiero and other cities exercise an effective control over outdoor advertising by taxation. Every small placard, including notices in shop windows, must bear a revenue stamp. The tax on signboards is heavy and consequently the number is limited, since the announcement must be important in order to make it profitable to pay the tax.

10. *Argentina.* — In Buenos Aires the city authorities erect billboards and rent the space. A tax is also assessed upon the poster — the highest assessed by any city — and the revenue is estimated at $100,000 annually.

From this survey it will be seen that the general agencies of effective billboard regulation abroad are:

1. Restriction of places where posters may be exhibited;
2. Taxation of boards and signs according to size;
3. Licensing of boards and billposters;
4. Municipal monopoly of kiosks and billboards, either through a franchise, as in Berlin, or by direct ownership, as in Buenos Aires.

Not all these methods, however, are possible in the United States, since here one meets with stricter constitutional limitations than in any other country.

IV. Billboard Regulation in the United States.

The methods of regulation in the United States may be classified under four heads:

1. *Regulation under the Police Power.*

Constitutional Limitations. — The absence of efficient billboard regulation in the United States may be largely attributed to the rigorous constitutional limitations imposed upon the exercise of legislative power over private property. For this reason, regulations like those of foreign countries which limit or prohibit billboards would for the most part be held unconstitutional if established here. By the Federal Consti-

tution and quite generally in the State constitutions the taking of private property for public use without compensation is forbidden, and the right is guaranteed to every citizen that his property shall be taken only by due process of law. It is therefore impossible to take property or to regulate it in a way that will impair its value, unless this action can be justified as an exercise of the police power. Owing to these constitutional limitations as to the taking of property there have been few attempts by States or cities to abolish billboards. Such efforts at regulation as have been made have been in the guise of an exercise of the police and taxing powers, and the decisions as to the constitutionality of these statutes and ordinances are not yet sufficiently numerous to have produced any settled doctrine as to their validity.

The limits of the police power cannot be determined with exactness, and they are constantly changing with new developments in social and economic conditions. The courts have consistently refused to attempt any comprehensive definition of the police power, and have taken refuge in certain general phrases. It may be said that any statute which is designed to promote the public welfare in matters of "health, safety or morals" will be upheld by the courts, even though it may deprive an owner of private property of the full use of it, or even destroy its value. In recent decisions the Supreme Court has employed language which much extends the traditional boundaries of the police power. In Chicago, Burlington & Quincy Ry. *v.* Drainage Commissioners (1906), 200 U. S. 561, 592, the court said:

> We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, public morals or the public safety.[1]

This, however, is but a return to the doctrine long ago enunciated by Chief Justice Taney in the License Cases (1847), 504, 584, where he said:

> What are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.

[1] A considerable number of decisions in which legislation for the general welfare was upheld as a valid exercise of the police power are cited in Evans, *Leading Cases on American Constitutional Law*, 413.

While the Federal Supreme Court has very recently said that it will interfere with the police regulations of the State authorities only when they have "no real or substantial relation to the public health, safety, morals, or to the general welfare,"[1] the question still remains as to whether the State courts would follow the Federal courts in their interpretation of the range of the police power. In some States they have done so, but in Massachusetts it may be assumed with considerable certainty that the narrower interpretation would still be applied.

Regulation upon Æsthetic Grounds. — Even in the States which give the broadest scope to the police power, it seems to be settled that limitations upon the use of private property imposed for purely æsthetic reasons are unconstitutional. This rule was laid down in the case of the Commonwealth *v.* The Boston Advertising Company (1905), 188 Mass. 348, which is generally cited as the leading authority upon this point. A statute enacted in 1903 gave to the Metropolitan Park Commission the power to prohibit the erection of any advertising device which should be plainly visible to persons passing along the parkway (exception being made in the case of small signs which related to business conducted on the premises). The Commission then attempted to remove a large orange and black billboard upon a lot which bordered the Revere Beach Parkway; but the right to do so was denied by the court. As a result the Commission has succeeded only in preventing the erection of billboards within the actual limits of the park.

Only in one instance has a court held that æsthetic considerations were sufficient to justify an ordinance excluding billboards from a community. This happened in California where the town of San José enacted a local ordinance prohibiting advertising signs and provided a five-day limit in which billboards contrary to law must be removed. The billposting company of Varney & Green refused to comply and filed a petition for a perpetual injunction to restrain the town marshal from enforcing the ordinance. In the lower court the judge refused to issue the writ, upholding the ordinance on the ground that the æsthetic value of a signless neighborhood was within the protection of the law, and that a billboard was a nuisance in the same class with offensive trades and noises.

[1] Cusack Company *v.* Chicago (1917), 242 U. S. 526.

This decision was not affirmed. The Supreme Court of California declared the ordinance invalid as a "sweeping prohibition, beyond the power of the town trustees." In the decision reversing the decree of the lower tribunal, the Supreme Court of California said:

> That the promotion of æsthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. Such restriction is, if not a taking, *pro tanto*, of the property, a damaging thereof — for which . . . the owner is entitled to compensation.[1]

But it has been decided, both in Massachusetts and by the Supreme Court of the United States, that if legislation can be justified for reasons of public health, safety or morals, it does not become unconstitutional because, in addition to the above grounds, its enactment may have been influenced by æsthetic considerations. This point was determined in the case of Welch *v.* Swasey (1907), 193 Mass. 364; (1909), 214 U. S. 91. Here the Supreme Courts of both Massachusetts and the United States upheld the zoning of Boston for fire protection purposes, which involved limiting the height of buildings in certain districts without compensation. In the opinion by the Supreme Court of Massachusetts the following significant statement was made (193 Mass. 364, 375):

> The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely æsthetic objects, but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary.

Thus far the immediate question of æsthetics has not been passed upon by the Supreme Court of the United States. In the case of Eubank *v.* Richmond (1912), 226 U. S. 137, this court declined to consider the point; but the implication would seem to be that it would follow the general rulings of the State courts. The conclusion which we must draw, then, is that an attempt to regulate billboards purely for æsthetic reasons will

[1] Varney & Green *v.* Williams (1909), 155 Cal. 318, 320.

not be upheld, but that such reasons may enter in "as auxiliary" in an ordinance based upon reasons of public health, safety or morals.

May Regulation be based on Grounds of Public Safety? — It may be assumed that a reasonable regulation of the construction of billboards in accord with the usual building regulations in congested districts will be held valid by the courts of this State. On this point the Massachusetts Commission on the Taxation of Signs commented as follows:

> The police power of this State has very generally been delegated to municipalities, and it is probable that all cities and towns in the Commonwealth have now full power to regulate by ordinance the construction of outdoor advertising so far as the Legislature has that power. To determine the exact scope of the powers of municipalities would require an extended study of municipal charters and special legislation, which it would be impossible for this commission to make in the time available for its report. In other States where regulation has been attempted, it usually has been by local ordinance and not by a State law. In connection with the constitutional difficulties which surround any attempt to regulate outdoor advertising, any reason for local rather than State regulation should be considered. In determining whether regulations were really founded upon reasons of public safety rather than æsthetics, courts might be led to believe that it was the latter, if a law requiring fireproof construction or limitation of size and location were uniformly applied in sparsely settled as well as in thickly settled districts. Although a general law could be framed that would be applicable only in sufficiently congested districts, it would be more difficult for the Legislature to do this than for the municipalities to determine for themselves whether or not local conditions make regulation of construction and location of outdoor advertising appropriate.[1]

Most billboard ordinances are justified as measures of public safety to protect passersby from fire and wind dangers; and censorship of the posters exhibited may be upheld for the protection of the public morals. Regulations have occasionally been upheld for reasons of public health, but in these cases there has been close connection with fire and wind hazard. There has been much discussion in the various States as to the extent to which the use of the regulating power will be deemed reasonable.

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[1] *Report of the Massachusetts Commission on the Taxation of Signs*, 5 *seq.*

What Regulations are held to be Reasonable. — In general it may be said that ordinances limiting the height of a sign and making a requirement of fireproof construction in congested districts will be upheld by the courts.[1] Regulations which require a certain clear space between the board and the ground and also requirements as to spaces between boards and buildings for purposes of gaining access and egress in case of fire have been upheld as a means of protecting the public safety and public morals.[2]

As to roof signs the same general principles hold. In New York a regulation for roof signs which did not apply to other projections above roofs was held to be unconstitutional.[3] But Missouri has regarded such legislation as permissible.[4] The same principles apply also to electric and illuminated signs, where the fire hazard is much more obvious.

The city has the power to prohibit absolutely all advertising upon its streets or on other public property, and may also forbid posters upon temporary sheds erected in the course of building operations which extend into the street.

It has been decided that a park commissioner cannot rent space upon a fence surrounding a park for advertising purposes.[5] But, as has been shown in the case of the Commonwealth *v.* Boston Advertising Company (1905), 188 Mass. 348, this control is not generally admitted to extend to the property surrounding the park nor to allow the prohibition of advertising on adjoining land. However, in one case at least, the prohibition of signs within one hundred feet of a parkway was held valid. (Gunning Co. *v.* Kansas City (1912), 240 Mo. 659.) And there are similar provisions in regard to certain localities in some other cities, but they have not yet been tested in the courts.

It is decided that a city has the right to prohibit certain classes of advertisements near schools and churches (Horton *v.* Old Colony Bill Posting Co. (1914), 36 R. I. 507) and in some cases to provide restrictions on other locations. In New

[1] *In re* Wilshire (1900), 103 Fed. 620; Gunning System *v.* Buffalo (1902), 75 App. Div. (N. Y.) 31.

[2] St. Louis Gunning Co. *v.* St. Louis (1911), 235 Mo. 99; Kansas City Gunning System *v.* Kansas City (1912), 240 Mo. 659; Cream City Bill Posting Co. *v.* Milwaukee (1914), 158 Wis. 86; Horton *v.* Old Colony Bill Posting Co. (1914), 36 R. I. 507.

[3] People *v.* Murphy (1909), 195 N. Y. 126.

[4] St. Louis Gunning Advertising Co. *v.* St. Louis (1911), 235 Mo. 99.

[5] Tompkins *v.* Pallas (1905), 47 Misc. (N. Y.) 309.

York State the city of Rochester passed an ordinance which required that a permit must be secured from the city authorities before a billboard could be erected anywhere, and that before the permit could be granted, a public hearing must be held at which the property owners of the vicinity could be heard. This ordinance was sustained in Rochester *v.* West (1900), 164 N. Y. 510.

It may be observed that the question of reasonableness in billboard ordinances has been rather broadly interpreted and the more recent decisions especially have upheld most regulations which are not a palpable interference with private rights. The courts seem continually to be approving ordinances more minute and more drastic.

May a Statute be Applied Retroactively? — It is an unsettled question whether a law may be made retroactive so as to require the removal of billboards already erected. In some instances such a provision has been held invalid. But in a recent case a requirement to this effect was sustained. (Cream City Co. *v.* Milwaukee (1914), 158 Wis. 86.)

The Exclusion of Billboards from Residential Districts. — May billboards be excluded from residential districts? Formerly this was a difficult question. The Massachusetts Commission on the Taxation of Signs reported in January, 1915, that it was doubtful if a regulation so excluding boards would be sustained in this State. But a great step towards clearing up this question has been taken by the Supreme Court of the United States in the case of Cusack *v.* the City of Chicago (1917), 242 U. S. 526, in which the right of a city to exclude billboards from residential districts was upheld as a valid exercise of the police power for the benefit of public health, safety and morals. This case is so important in its relation to possible regulation in the future that it deserves more than a mere mention.

The city of Chicago a few years ago enacted a billboard ordinance which gave to the property owners in residential districts the privilege of deciding whether or not billboards should be erected near their property. Before a billboard may be erected written consent must be obtained from a majority of the property owners on both sides of the street in any block in

which half or more than half of the buildings are used for residential purposes (Art. 23, Sect. 707 of the Building Code). Every violation of the ordinance is punishable by fine, and each day the violation continues constitutes a separate offense. Further to prevent illegal advertising, each company doing a billposting business in the city is required to file a bond for $25,000 with the city clerk, which serves to reimburse the city for possible losses through suits for damages.

This statute was upheld by the Supreme Court of Illinois as a valid exercise of the city's police power. (Cusack *v.* the City of Chicago (1914), 267 Ill. 344.) An appeal was taken to the Supreme Court of the United States, on the ground that the Chicago ordinance was in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

The city of Chicago maintained that it could legally prohibit the erection of billboards and similar structures in residential blocks; that having the power to prohibit, it could designate conditions under which billboards could be maintained; also that "frontage consent" provisions had been for many years recognized as valid by the Supreme Court of Illinois and held not to be a delegation of legislative authority. The city contended furthermore that billboards were of such a character that the control of their location was a proper exercise of the police power, and that structures not nuisances *per se*, and hence not subject to total legislative suppression, might, by reason of their location or inherent attributes, be prohibited under certain circumstances and in particular localities.

To prove that billboards were of such a character that the control of their location was a proper exercise of the police power, the city cited the following cases:

1. State *v.* Staples (1911), 157 N. C. 637, where the city of Asheville required a space of two feet between the board and the ground, and this was upheld on the ground of public health and safety.

2. *In re* Wilshire (1900), 103 Fed. 626, where the court sustained an ordinance of the city of Los Angeles prohibiting billboards of a greater height than six feet.

3. St. Louis Gunning Co. *v.* St. Louis (1911), 235 Mo. 99, where the court justified certain ordinances for the reason that

billboards were a fire risk and liable to be blown over by wind; that the ground in the rear thereof was used for dumping of deleterious matter and waste; that they served as a shelter for immoral acts; and that they shut off light and air.

It was admitted by the city that an ordinance excluding billboards, without qualification or limitation, from all parts of the city would be unconstitutional, as was held in Chicago *v.* The Gunning System (1905), 214 Ill. 628. But in residential districts the city claimed that the billboard might be prohibited for the purpose of protecting the public safety and decency, because the billboards furnished protection for the criminal in neighborhoods of homes where women and children were not assured of sufficient protection and because they sheltered criminal practices.

The contentions of the city of Chicago were completely upheld by the Supreme Court of the United States. In the opinion handed down on January 15, 1917, the court said:

> Obviously, claims made [by the plaintiff in error Cusack] under the Fifth Amendment need not be considered, . . . and there remains only the question whether the ordinance, if enforced, would work "a denial to the plaintiff in error of the equal protection of the laws" or would "deprive it of its property without due process of law." . . . The Supreme Court of the State of Illinois sustained the validity of the ordinance in an opinion (267 Ill. 244) which declares that the Act of the Legislature of that State, passed in 1912, Hurd's Stat. 1913, ch. 24, par. 696, is a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control. It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the City of Chicago by the Legislature, that it is to be treated as proceeding from the law-making power of the State, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. . . . Neglecting the testimony, which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves, St. Louis Gunning Advertising Co. *v.* St. Louis, 235 Mo. 99, and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health and decency of the community. The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected.

The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute.

As a consequence of this decision by the Supreme Court of the United States it is now conclusively settled that a city has the right, subject to the provisions of the Constitution of the State, to prohibit the erection of billboards in residential districts or to regulate them in the exercise of its police power, on the grounds of public safety, health and morals. It should be noted that the question of æsthetics did not in any way enter into the case, and therefore was not passed upon by the court.

2. *Regulation of Billboards under the Authority of an Amendment to the Constitution, as suggested by the Massachusetts Commission on the Taxation of Signs.*

So far as can be ascertained, there has not been adopted in any State a constitutional amendment permitting the regulation of billboards for æsthetic reasons. The Massachusetts Commission on the Taxation of Signs, however, submitted a proposed amendment to the State Constitution which read as follows:

Full power and authority are hereby given and granted to the General Court to regulate, restrict, or prohibit advertising in public highways, in public places, and on private property within public view.

No action has as yet been taken upon this proposal by the Legislature.

In support of its proposal the Commission argued as follows:

To accomplish the purpose of those who desire the restriction of outdoor advertising because of its unsightliness, it seems clear that a change in the Constitution is necessary. It is not clear that, even if an appropriate amendment to the Constitution of Massachusetts be adopted, regulation on purely æsthetic grounds would be sustained by the Supreme Court of the United States. It is well settled that under the Fourteenth Amendment to the Constitution of the United States no State Legislature can take private property for public use without compensation, and under this amendment the Supreme Court of the United States has frequently held unconstitutional State legislation purporting to be enacted under the police power, which it held was not justified under that power but was in fact a taking of private property. That court has shown

great deference to decisions of the State courts that State statutes were within the police power on the ground that the State court best knew local conditions. The court might therefore be influenced by an express amendment to the State Constitution as a definition of the proper scope of the police power. It might be argued in opposition that the fact that an amendment to the State Constitution was necessary showed that within the police power as ordinarily defined, regulation for æsthetic reasons alone is invalid; and the Supreme Court of the United States might well decide that until an amendment of the Constitution of the United States is adopted modifying the limitations imposed by the Fourteenth Amendment, it would be bound to declare unconstitutional legislation which it felt was beyond the scope of the police power as ordinarily defined, even though the State Constitution has been expressly amended to permit it. In this connection, however, it must be borne in mind that the Supreme Court of the United States has not yet decided that regulation solely for æsthetic reasons is unconstitutional, and that those who advocate such regulation would be in a better position to obtain a favorable decision by the Supreme Court of the United States if restrictions in the State Constitution were removed.[1]

3. *Regulation under the Right of Eminent Domain, by Excess Condemnation, and by the Levy of Betterments.*

Thus far, this bulletin has discussed the regulation of billboards under the police power and under the authority of an amendment to the Constitution — in other words, regulation without compensation. A third method of controlling billboards is by exercising the right of eminent domain. This power of eminent domain gives the State the right to take any property for a public purpose provided that compensation is given to the owner, and it may in that way condemn billboard locations. It is settled in this State that public money may be expended for æsthetic purposes, and hence a municipality may protect its public places in that way. But it is a very expensive way.

In some States there has been given to the authorities the power of excess condemnation. (See Bulletin No. 19.) This may be defined as the right of the State or the city, in making improvements, to purchase the property bordering the improvement with the right of subsequent resale with restrictions imposed upon the purchaser. This is an effective power since it not only secures to the city the increment arising from the improvement, but also allows the city to protect the improved

[1] *Report of the Massachusetts Commission on the Taxation of Signs*, 9.

area from future disfigurement and exploitation by individuals. The right to exercise excess condemnation involves the premise that the taking be in connection with a public purpose; and in the last instance the courts may have to decide upon what is a public use. The presumption, however, is always in favor of the act and it will not often be questioned. The protection of parks and parkways has been deemed such a public use, and restrictions, whether for proper light or even for æsthetic reasons alone, will usually be upheld by the courts. Very often after an improvement is completed, there are left at advantageous points near the improvement various odd-shaped lots too small for any building. These are seized by the ever-watchful billposter and soon the whole prospect is marred by unsightly boardings pushed to the very boundary of the area which the public has tried to make beautiful. Under its right of excess condemnation the city may purchase all odd lots and save them from any such use, provided, of course, that the city's power in this regard is not too closely circumscribed in the matter of condemning excess property. In Massachusetts it is restricted to somewhat narrow limits.

In some cases it appears that the whole value of land for a billboard privilege is due to the construction of a public work, such as a park or boulevard. The Massachusetts Commission on the Taxation of Signs suggested an ingenious arrangement, namely, that a betterment could be assessed upon the property adjoining the improvement, the value of which theoretically would be equivalent to the property right of erecting a billboard upon that land. This property right could then be taken over by the State through its power of condemnation. The amount of compensation to be paid by the State to the owner for the condemnation of his billboard right should be made equal to the betterment to be paid by the owner to the State; then the sums would offset each other, so that no money need pass, and moreover, the property would be perpetually free from billboards. In order that no net loss should fall upon either party, the amounts charged for the betterment and for the taking should be determined by the same jury at a single trial.

4. *Regulation of Billboards by Taxation.*

A means of regulating billboards is offered by billboard taxation. The imposition of a tax tends to reduce the number of billboards and enables the city to regulate more effectively their size, construction, location and general character. Most of the commissions which have investigated the subject advise some such measure, and the American Civic Association has endorsed taxation as a fair and effective method of regulation.

It is obvious that a state-wide system of taxation would have advantages over a local tax so far as its fair administration is concerned. A State authority could more easily levy taxes upon advertisements in railroad and electric cars.

San Francisco has levied a progressive tax upon billboards in proportion to their gross earnings, which must be reported to the city four times a year. Other cities have attempted to tax the boards at so much per square foot; but here in most cases the tax has been so heavy that the courts have declared it confiscatory. For example, a license fee of fifty cents per square foot on all existing signs beyond a certain size and height was held unreasonable because the proprietor of the billboard would pay under it nearly twice its gross income. (Chicago *v.* Gunning System (1905), 214 Ill. 628.)

The Mayor's Billboard Advertising Commission (New York) in its report in 1913 recommended a progressive tax varying (1) with the size of the sign and (2) with the height of the sign above street level. It further suggested that an illuminated sign which was visible both day and night should have its rate doubled.

The various problems which the taxation of billboards would present in this Commonwealth were considered at length by the Commission on the Taxation of Signs. The report of this Commission on the subject is too technical for complete elucidation in a short summary, and anyone interested in the matter must be referred to the report itself. A general survey of the findings made, however, may well be included here, since they bear directly upon the conditions to be met with in this State. As to regulation by taxation, the Commission said:

Under the Constitution of Massachusetts the Legislature may levy either property taxes or excises. Property taxes must be both reasonable and proportional. Excises need only be reasonable. Excises can be levied only on goods, wares or merchandise, or other "commodities." The word "commodity," however, has been given a very broad interpretation in this State. Most of our excises are levied upon what our courts call "commodities."

Property Taxation. — Outdoor advertising devices are now taxable as either real or personal property. The value of land for taxation includes its value as a site for such devices, and if this is its most valuable use, its value for such purpose should be the assessed valuation. (Essex Company *v.* Lawrence, 214 Mass. 79, 90.) Ordinarily, however, this is not the most valuable use of the land, and no additional site value could be assessed because the land is used for outdoor advertising while awaiting development. The value of the outdoor advertising device as a structure may be assessed separately like a building, but this value is usually insignificant. If the device attached to land or buildings is legally personal property, it may be assessed as such under the present law.

It is obvious that no special property tax on such devices can be enacted in this State, because such a tax would be disproportional.

Excises. — It was strongly urged at the hearings that outdoor advertising could be taxed under a special excise, and it was implied from the attitude of some of the speakers toward the subject that they desired to have such advertising devices taxed out of existence. . . .

The limitations on the enactment of excises in Massachusetts are decidedly uncertain. The judges of the Supreme Court themselves when they last fully discussed the subject, in the Opinion of the Justices, 196 Mass. 603, were hopelessly divided on the fundamental principles upon which such limitations can be laid down. If a sign is real estate, however, it seems clear that it cannot be taxed as goods, wares or merchandise; and although the word "commodity" has been broadly interpreted to permit this State to enact excises which were customary from the earliest times here, and have always been permitted as excises under less rigid restrictions in other States, it could hardly be stretched to include anything that was really real estate. Moreover, any excise that is in substance a property tax will be treated by the courts as such regardless of what it is called. Excises on public service corporations measured by length of rails and pipes have been held invalid on the ground that they were really property taxes. (Pittsburg Ry. Co. *v.* Pittsburg, 211 Pa. 479.) As a property tax, any special tax on outdoor advertising devices would be unconstitutional because not proportional. It is possible that an excise on some privilege connected with such devices, such as the transfer of them, could be sustained. The question there would be whether the isolation of outdoor advertising devices in a class by themselves for the purpose of an excise on their transfer, not applicable to transfers of other kinds of property, would be a reasonable classification, like a separate

classification of certificates of stock in corporations and associations, or a classification based on an immaterial circumstance like the separation of sales plus a trading stamp from all other sales. (O'Keefe *v.* Somerville, 190 Mass. 110, 112.) It seems probable that such a classification would be held unconstitutional. It would certainly afford justification for the contention that the real purpose was not to raise revenue by taxation but to avoid constitutional limitations preventing extermination of billboards by regulation.

Occupation and License Taxes. — A license tax is doubtless permissible as an excise under the State Constitution. Even the judges who favored the narrow interpretation of the constitutional right to levy excises on commodities recognized that a license tax might be imposed upon an occupation which the State might regulate. "There is a large class of occupations in regard to which the State may well legislate by regulation in the public interest and they frequently have been subjected to excise taxes in this Commonwealth and elsewhere. Attorneys at law, auctioneers, tavern keepers and retailers of spirituous liquors are among those engaged in occupations of this class." (Opinion of Justices, 196 Mass. 603, 625.) As has been previously stated, regulation seems clearly within the scope of the police power.

It is well settled under other Constitutions, however, that a license tax, unless levied on a business that can be wholly prohibited under the police power, must be limited approximately to the cost of regulation (Gaynor *v.* Roll, 75 At. 179 (N. J.)); and even if such were not the decision under our State Constitution, the Supreme Court of the United States has held that a license tax, justified solely on the ground of the police power, to avoid the prohibitions of the Fourteenth Amendment requiring equal protection of the laws, must not exceed approximately the cost of regulation. (Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 164.)

If the business licensed is one which the State under the police power may wholly prohibit, such as the liquor business, so-called license fees required as a condition of carrying it on may exceed the cost of regulation even if justified under the police power and not as a revenue measure. (Gray, Limitation of the Taxing Power, Sec. 1452; Howes *v.* Maxwell, 157 Mass. 333, 334.) This exception does not concern us here, for it is plain that under our present Constitution outdoor advertising cannot be absolutely prohibited. (Bryan *v.* Chester, 212 Pa. 259.) A license tax owing to this constitutional limitation would probably in no way satisfy the advocates of taxation.

Apart from license taxes, justified rather under the police power than under the taxing power, the only possibility is an occupation tax upon the business of outdoor advertising. If upheld by our own Supreme Court under the clause permitting an excise on commodities, it clearly would be upheld by the Supreme Court of the United States, for it has been decided several times that occupation taxes enacted by the States are not repugnant to the Fourteenth Amendment, and very broad powers as to the

rate and method of assessment have been upheld. The only limitation is that the Court shall not be able to say that the method of classification adopted could not have been deemed reasonable by the Legislature. Classifications within an occupation based on the amount of business done with a different rate of tax for each class and even with progressive rates have been upheld in occupation taxes as in inheritance taxes. (Bradley *v.* Richmond, 227 U. S. 477; Clark *v.* Titusville, 184 U. S. 329, 334; Quong Wing *v.* Kirkendall, 223 U. S. 59, 62, 64; Singer Sewing Machine Co. *v.* Brickell, 34 Sup. Ct. Rep. 493, 497; Ohio Tax Cases, 34 Sup. Ct. Rep. 372, 376.)

If an excise on this occupation can be levied in this State, it would seem from the language of some of our decisions that there would be little difficulty with the question of classification or measure or rate of tax. (Conn. Insurance Co. *v.* Comm., 133 Mass. 161; Boston Elevated Ry. Co. *v.* Comm., 199 Mass. 96, 98.) If the Pennsylvania decision above referred to is followed, however, it might be impossible to levy an occupation tax the rate of which should be measured by the size of the billboards.

A license fee of 50 cents per square foot on all existing signs beyond a certain size and height was held unreasonable because the proprietor of the billboard would pay under it nearly twice its gross income. (Chicago *v.* Gunning System, 214 Ill. 628.)

It is a most difficult problem to predict what the Supreme Judicial Court of Massachusetts would say as to the validity under the State Constitution of an occupation tax limited to outdoor advertising. It is not clear from the Opinion of the Justices in 196 Mass. 603 that even those who favored strict construction meant to limit the right of the State to levy an occupation tax under the clause permitting excises on commodities. The court was then specifically considering an excise on the commodity of transfer of title to shares of stock in corporations and associations. Judges Knowlton, Morton and Braley recognized that some occupation taxes might be assessed. It is possible that they would have held, if the question had been before them, that such an excise could only be levied on occupations which derived some privilege from the State, or must be treated as identical with a license tax upon a business that could be regulated. They mentioned attorneys, auctioneers and innkeepers as engaged in occupations that had been subjected to such excises. A few lines above they said, "an excise tax, under our Constitution, cannot be imposed upon the mere exercise of a natural right which is not a proper subject for governmental regulation." (196 Mass. 603, 625.) Judges Hammond, Loring and Sheldon, who took the broad view of the power conferred by this clause of the Constitution, held that under it the Legislature had the same power to levy excises as the Legislature of New York or the Congress of the United States. (196 Mass. 618.) If this view is sustained there is undoubted power to levy such an occupation tax. Judge Rugg, who differed from all the others, said nothing which throws light on his views on this particular subject. (196 Mass. 619.)

In the previous decisions of the court there have been noticeable swings on the one hand toward strict construction, and, on the other hand, toward liberal construction of this clause. The earliest important decision laid down a liberal interpretation. (Portland Bank *v.* Apthorp, 12 Mass. 252, 254.) Judge Knowlton and his associates thought this had been limited by the case of Gleason *v.* McKay, 134 Mass. 419, 424, as followed in O'Keefe *v.* Somerville, 190 Mass. 110, 112. (196 Mass. 629.) The problem is one of interpretation of the word "commodity," to which a somewhat strained interpretation has always been given in this State in order to justify taxes which had been customary. The only limitation on an excise on a commodity is that it shall be reasonable, but the courts seem to have treated the definition of the word "commodity" and the limitations imposed by the word "reasonable" as substantially the same problem.

V. Conclusion.

The Commission on the Taxation of Signs did not feel able to recommend any special tax that would positively be sustained by the courts under the present Constitution of Massachusetts. Within certain limits regulation was found to be possible, and the Commission presented a draft of a bill designed to give effect to such action. The Commission recommended, however, as the most advisable step to be taken, the adoption of the amendment already cited conferring upon the General Court full power and authority to deal with the subject.

Note. — Since the foregoing account was prepared the Constitutional Convention of Massachusetts submitted to the people the following amendment and it was ratified November 5, 1918:

Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law.

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BULLETIN No. 32

THE REGULATION OF THE LIQUOR TRAFFIC

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THE REGULATION OF THE LIQUOR TRAFFIC.

The endeavors to counteract or prevent the dangers incident to the traffic in intoxicants have found expression in a mass of legislation which in its main features may be reduced to three general types expressed in the words restriction, prohibition, and monopoly.

I. Restrictive Legislation.

Since colonial days the selling of liquor, especially by the drink, has been regarded in the United States as a business which for the public good should be subject to restrictions and extraordinary taxation. The regulative measures adopted in the early days were chiefly designed to curb disorder arising from public intoxication and to provide a convenient source of revenue; but they contained in principle the germ of legislation out of which have grown the present-day elaborate license systems that set the liquor traffic apart from all other business and subject it to particular authority, specific limitations and restrictions, as well as to heavy taxation.

The modern development of license laws followed upon the abandonment of the early experiments with prohibition. The consciousness of the drink evil, which had been awakened during the first general temperance movement and the subsequent agitation for prohibition, made it impossible to return to the former loose ways of private liquor selling. In Massachusetts this development occurred after two experiments with prohibition (1852–1868; 1869–1875). Since that time the laws of this Commonwealth as well as of other States have continuously been modified or expanded but with few additions of vital principles.

The liquor legislation of Massachusetts, as well as that of some other States, has centered about these particular questions: (1) Taxation; (2) The limiting and classifying of li-

censes; (3) Licensing authorities; (4) General restrictions upon selling; (5) Local option, or permitting the local community to choose between license and prohibition.

1. Taxation.

Although the taxation of licenses to sell liquor had long been recognized as an important source of revenue, the theory gained ground in the early eighties that the imposition of as high fees as the traffic can bear would prove a means of stopping excesses and promote order, on the assumption that the higher the fee the greater would be the likelihood of weeding out sellers of little financial responsibility and inferior standing and of placing a natural limitation on licensed places. The high license system, so called, was adopted as such by Massachusetts in 1888, and is in force to-day under various forms in most of the States that legalize liquor selling.

2. The Limiting and Classification of Licenses.

Coupled with the question of high fees has always been that of classifying licenses primarily for fiscal purposes, but also with a view to a proper differentiation of the various kinds of traffic in liquor in the interests of public morality. Among measures intended to safeguard the public may be mentioned those adopted to prevent others than the legalized retailers from dispensing liquor as a beverage, to divorce the bottle and "growler" trade from the sale of intoxicants by the drink, to permit the sale of fermented liquors alone at a reduced fee, etc.

The Massachusetts high license act of 1888 contained a clause limiting the number of licenses to be issued to retailers in proportion to population (1 to 500 inhabitants in Boston, and 1 to 1,000 inhabitants elsewhere in the State). This statutory limitation of selling privileges has come into wide use in license States and in some places is accomplished through the adoption of local regulations.

3. Licensing Authorities.

The choice of licensing authorities has invariably been one of the most controverted points in liquor legislation. On the one side has been demanded the selection of men as such author-

ities who are above suspicion of selfish or political motives, endowed with sufficient power to enforce the laws fairly and having as their foremost purpose to protect public interests. On the other side has been sought greater freedom for the traffic and the escape from onerous restrictions. After experimenting with numerous licensing bodies, Massachusetts has placed the power to license liquor dealers in the hands of a Board of Commissioners appointed by the Governor for Boston; vests it in boards appointed by mayors for other municipalities, and in the selectmen for the towns. Within the limitations prescribed by law these authorities have a wide discretion in selecting applicants for licenses, approving saloon places, and in revoking or suspending privileges for infraction of regulations, etc.

Other States have adopted different types of licensing authorities. Thus New York has a State commissioner who through his deputies and agents has full charge of all liquor licenses. This system has fiscal purposes for its aim rather than the careful selection of licensees and a constant supervision of their activities. In Pennsylvania, the Judges of the Court of Quarter Sessions are the licensing authorities, enjoy full power to grant or revoke privileges as public interest may demand, and transact all matters relating to the traffic in open court. In some States (Ohio, New Hampshire, etc.) State licensing boards exist; but the function of awarding liquor privileges has for the greater part been exercised by city councils, the board of county commissioners, or other locally chosen political bodies.

4. General Restrictions upon Selling.

Of the almost innumerable restrictions with which it has been sought from time to time to surround the liquor traffic, the principal ones that have survived in Massachusetts legislation forbid the sale of intoxicants to minors and intoxicated persons, regulate the hours of sale, and the location (away from school houses and churches) and interior arrangements of saloons; prohibit gambling and the employment of minors, and aim to divorce liquor selling from prostitution. A great deal of restrictive legislation has failed to stand the test of time, and much has not been really useful in bettering the conditions under which liquors may be sold.

5. Local Option.

In 1881 Massachusetts adopted the principle of local option, under which each municipality and town is called upon annually to decide by majority vote whether the sale of liquor shall be legalized during the ensuing year or not. The value of the principle of local option when applied to rural places and small towns and certain municipalities, particularly to those near a licensed center, has long been vindicated by experience. Its success, where there is a constant shifting from license to no license and *vice versa,* or where the laws against illegal selling are badly enforced, is indifferent. Nearly all States under license have some form of local option. In most instances the vote is taken by county units upon petition of a stated proportion of the legal voters at special elections, and the decision thus arrived at stands for a period of two years. The selection of the county as a local option unit has proved a convenient and effective entering wedge for state-wide prohibition.

6. Repression the General Policy.

The keynote of American liquor legislation is repression; and the Massachusetts high-license system, which takes high rank among others of its kind, forms no exception. The opponents of license have steadfastly refused to countenance efforts purporting to remove some of the fundamental defects inherent in the American systems of private liquor selling for private profit on the ground that the traffic is in itself immoral, and that whatsoever would surround it with more respectability would also insure its greater permanency. Thus it has come to be that the progressively stringent license regulations remain largely repressive and are directed against drink-selling as an institution rather than at the drink evil itself. They serve more or less to eliminate certain excesses, but are not designed to influence the attitude of the individual toward the use of intoxicants. How profoundly it has affected the character of the liquor traffic that the pivotal question in dealing with it has been whether it should be legalized or suppressed, may easily be inferred.

II. Prohibition.

1. The Growth of Prohibition.

In general, American liquor legislation has offered no other alternative to restrictive license laws than prohibition. The movement for prohibition, which began in the State of Maine in the middle of the last century, spread with great rapidity. By 1890 the following States, in the order named, had adopted some form of prohibition: Maine, Illinois, Massachusetts, Rhode Island, Vermont, Connecticut, Delaware, Indiana, Iowa, Michigan, Nebraska, New Hampshire, New York, Kansas, South Dakota, North Dakota. For a variety of reasons the early experiments with prohibition proved short-lived in a number of States, although in several they lasted long enough to demonstrate how far the policy was practicable. Thus, for instance, Massachusetts had more than twenty years' experience with it, while Vermont and New Hampshire had many more.

From 1890 until about 1900 the prohibition movement remained largely dormant. Then it was revived, particularly in the South, and soon these States were added to the prohibition column: Oklahoma, Georgia, Alabama, North Carolina, Tennessee and Mississippi. Still more recently the States of Arizona, Colorado, Oregon, Washington, Virginia, West Virginia, Iowa, Arkansas, Idaho and South Carolina have enacted prohibition laws. At the November elections of 1916 the States of Michigan, Montana, Nebraska and South Dakota and the Territory of Alaska adopted prohibition by a popular vote, while Florida and Utah chose gubernatorial candidates pledged to prohibition. Since that time, Indiana and New Hampshire have turned to prohibition through legislative enactment without a popular vote.

Self-evidently, during the long years of agitation the enactment of prohibition has been attempted innumerable times in different States and failed of acceptance.

The rapid gains for prohibition in the most recent years could probably not have been made except by the aid of thoroughly organized and powerful forces behind the movement which formerly were in large part lacking. The method has

been pursued in many cases of first securing local prohibition by counties, and when a sufficient number of these has been made dry to attempt state-wide prohibition through popular vote. While the means employed to arouse enthusiasm for prohibition in the opinion of some has not always been conducive to a free expression of the popular will, one must read in its widespread acceptance, especially in the last decade and a half, a strong protest against the saloon and the evils associated with it. How far this protest is synonymous with a desire for personal abstinence is not yet clear.

2. The Difficulties of Enforcement.

The failure of prohibition to achieve notable success in the earlier periods accounts in most instances for its repeal where this took place, as for instance in Massachusetts. The difficulties everywhere attending enforcement of the law, which in some instances seem insuperable, have had their root partly in local politics, partly in a lax public opinion, and partly in the ease with which intoxicants have been obtainable from outside of the prohibition area. More than this, prohibition for its complete success is said by its advocates to require a prohibition state of mind in the general population, which confessedly has been absent in numerous instances. Of recent years it has been sought to remedy this condition by direct legislation. Freedom to import intoxicants for private use has gradually been restricted and finally abolished by so-called "bone-dry amendments" that have been adopted in several States, and which go so far in some cases as to forbid the purchase of any alcoholic liquors even for sacramental and medical purposes. This new legislation has been facilitated by a Federal act which became operative July 1, 1917, under which no one may cause intoxicants to be transported into any State or Territory if such transportation would violate the law of the State or Territory concerned.[1] By means of this Federal act it thus becomes possible for any State to exclude the importation of all alcoholic liquor from the ordinary channels of transportation, and thus to secure the thorough enforcement of

[1] See *Statutes of the United States of America passed at the Second Session of the Sixty-Fourth Congress, 1916–17*, Part I, ch. 162, sec. 5. This section may be found in the Appendix, *post*, 33.

prohibition within its borders in case public opinion demands it. These newest adjuncts to the legal machinery in the warfare against alcohol have not yet undergone any real test, but should eventually prove the final measure of the practicability of actual prohibition. Until the present time no prohibition State can be said to have been wholly cut off from the supply of liquor, although under honest attempts at enforcement the quantity accessible may have been greatly diminished. In view of such circumstances, there is no convincing way of gauging the extent to which a community has become free from alcohol and how this is socially reflected. The suppression of the sale of intoxicants, with the abolition of the saloon and all that it stands for, is not the sole aim of prohibition in its real sense, for self-evidently alcoholism may flourish with little check so long as its source has not been stopped. It is beyond dispute that where liquor is easily obtainable through private importation and where illicit selling flourishes, the possible advantages from a prohibition policy are not appreciable.

3. The Argument on Prohibition.

The general arguments upon which the plea for prohibition is made are: (1) that alcohol in all forms and even in small doses is injurious to the human body; (2) that alcohol is the direct cause of a vast amount of pauperism, insanity, crime, disease, and social disorders of various kinds; (3) that the use of intoxicants represents an enormous waste in money and materials; and (4) that the liquor traffic is a main source of political corruption.

The opponents of prohibition both in and outside of the trade, while affirming the evils of alcoholism, contend that the moderate use of intoxicants is not injurious to the adult body, and that the remedy against abuse does not lie in complete prohibition but in the suppression of the more injurious alcoholic beverages and a wiser legislation concerning the production and sale of the others. They also aver that so far prohibition has not resulted in actual "bone-dryness" in any State; that the ease and cheapness with which alcohol of the most noxious kind can be produced will make its exclusion impossible so long as the appetite for it remains; that the temptation to

make money easily through illicit distillation will prove stronger than the fear of the law; that prohibition cannot thus remove the curse of alcoholism; and that prohibition unenforced inevitably breeds corruption and is a menace to government.

Both sides appeal to science in proof of their contentions and adduce other evidence in support from a great variety of sources. Meanwhile, the prohibition question has become firmly entrenched in politics; and where prohibition has been incorporated into the constitution or statutes of a State, the matter of enforcing the laws frequently plays an important part in local politics. Out of the generations of experience with prohibition the truth has emerged that sumptuary legislation cannot be vindicated unless it is backed by a strong public opinion — unless a prohibition state of mind rallies to its support. The new theory that such a state of mind can be dispensed with provided a sufficient legal power can be invoked is yet to be tested.

To date, the effect of prohibition upon the consumption of liquor has been accepted as the most conclusive proof of the general efficacy of outlawing intoxicants. The latest official returns of the United States Internal Revenue Office do not point to a decrease in the consumption of distilled spirits in spite of the large accessions of dry territory in recent years; and what decline, if any, will follow from the further spread of prohibition and the enforcement of the newest legal devices, cannot safely be predicted in advance.

III. Monopoly Control of Liquor Selling.

1. The South Carolina Dispensary System.

Except for isolated and brief experiments, this country has had to choose between the two forms of legislation concerning the liquor traffic which have already been discussed. The exceptions are the effort of South Carolina to make liquor selling a State monopoly under the so-called dispensary system, and the local applications of the same system in a few widely scattered communities. How ineffective the dispensary system proved to be in South Carolina may be seen from the fact that in 1901, while the laws of the State forbade the sale of liquor by individuals other than authorized dispensers, of 372 special li-

cense stamps issued in that State by the United States internal revenue collector, only 112 were issued to dispensers, while 260 were issued to individuals who were selling contrary to law.[1] The final failure of the South Carolina venture lay in its affiliation with State politics which at last undermined its usefulness when it became apparent that the power given the State to suppress the use of intoxicants was not properly exercised toward that end, but was to some extent employed in other interests. The principle underlying the dispensary system, namely, that drink-selling can be divorced from some of its gravest evils through the elimination of private profits and the utilization of a monopoly to counteract abuse in various ways, has by no means proven to be unsound.

The New Hampshire act of April 17, 1917, effective May 1, 1918, by which prohibition is established, provides that such liquors as are permitted to be sold for medicinal, sacramental, mechanical or scientific purposes shall be sold only by liquor agents appointed by the selectmen of towns and the mayors of cities, and such agents are required to purchase their stocks of liquor from State liquor agents appointed by the Governor. The prices at which liquors may be sold are to be fixed by the mayor and selectmen, and so far as possible they are to be so fixed "as to pay the expenses of the agency and leave no profit." Such profits as may accrue are to be paid into the State treasury.

2. The Gothenburg System.

European experience, extending over a long period of time (the Gothenburg company system as exemplified in Sweden and Norway and on a limited scale in Great Britain), has demonstrated the great superiority of certain forms of liquor monopolies over ordinary license systems. Under the so-called company system, private organizations are awarded by law the monopoly sale of liquor under the proviso that all profits beyond a modest return on the capital invested shall be returned in some form to the public, and that the monopoly power shall be employed to restrict the consumption of intoxicants and in every way to prevent abuse. Coupled with this method have been, especially in Norway, liberal provisions for

[1] South Carolina *v.* United States (1905), 199 U. S. 437; Evans, *Leading Cases on American Constitutional Law*, 229.

local option. Although this system of monopoly, which is applied solely to municipalities, has not taken in fermented liquors, their inclusion under it is simply a question of policy and not of the applicability of the fundamental principle. The stress of effort in Scandinavian countries has been directed against the abuse of distilled spirits, the sale of which by the drink has been eliminated on every hand under the company régime. In addition, it is now generally required that in order to purchase distilled liquors in larger quantities the applicant must possess a special license which under law may not be given to persons known to be intemperate or liable to abuse the privilege.

The advantages claimed for the company system are: (1) that it has brought about a steady and very marked decline in the consumption of distilled spirits which is unparalleled in other countries, while that of fermented liquors has not risen in proportion; (2) that by eliminating private profits it removes one of the most prolific sources of danger connected with the sale of drink; (3) that it divorces liquor selling from politics; (4) that it removes the obstacles which lie in the desire for private gain from progressive restrictions in the interests of temperance; (5) that it secures the profits from liquor for beneficent objects without affecting tax rates; (6) that it appeals to an enlightened public opinion, enlisting the co-operation of good citizens and paving the way for progressive temperance legislation.

The ground upon which the company system has proceeded is that distilled spirits are the most prolific source of alcoholism, and therefore effort has centered upon hedging in their sale with increasing restrictions. It is but the next step to include all alcoholic beverages under the same kind of monopoly. Meanwhile fermented liquors have been placed under the progressive system of taxation by which the most alcoholic are made to bear the heaviest burden and those under 2.25 per cent of alcohol are exempted from taxes. In contradistinction to this method of employing the taxing power, under our license laws the amount of the tax is not affected by the alcoholic contents of the beverage under consideration, while license fees are levied upon the place and not upon the amount and kind of alcoholic drinks sold.

Appendix A.

States classified according to their Methods of Regulation of the Liquor Traffic.

I. States which have or have had Constitutional Prohibition, with the Years in which it was in Force.

Arizona, 1915, 1916–[1]
Colorado, 1916–
Florida, 1919–
Idaho, 1917–
Kansas, 1880–
Maine, 1885–
Michigan, 1918–
Nebraska, 1917–
New Mexico, 1918–
North Dakota, 1889–
Ohio, 1851–1912;[2] 1919–
Oklahoma, 1907–
Oregon, 1916–[1]
Rhode Island, 1886–1889.
South Dakota, 1889–1895; 1917–
West Virginia, 1914–
Wyoming, 1920–

II. States which have or have had Statutory Prohibition, with the Years in which it was in Force.

Alabama, 1909–1911; 1915–
Arkansas, 1915–
Connecticut, 1854–1872.
Delaware, 1855–1857.
Georgia, 1907–
Idaho, 1916–1917.
Illinois, 1851–1853.[3]
Indiana, 1855–1858; 1918–
Iowa, 1855–1894; 1915–
Kansas, 1867–1880.[4]
Maine, 1851–1853; 1858–1885.
Massachusetts, 1852–1868; 1869–1875.
Michigan, 1853–1875.
Mississippi, 1908–
Montana, 1918–
Nebraska, 1855–1858.
Nevada, 1918–
New Hampshire, 1855–1903; 1918–
New York, 1855–1857.
North Carolina, 1909–
Rhode Island, 1852–1863; 1874–1875; 1886–1889.
South Carolina, 1915–
Tennessee, 1909–
Vermont, 1853–1903; 1927–[5]
Virginia, 1916–
Washington, 1916–

[1] In Arizona and Oregon two amendments for the prohibition of the liquor traffic have been adopted and are in force.

[2] The provision in the Ohio Constitution of 1851 seems to have been intended as a prohibition measure, but its peculiar phraseology permitted the sale of liquor to be carried on so long as it was not licensed.

[3] This statute applied only to the retailing of liquors in quantities of less than one quart.

[4] This statute applied only to the sale of liquors in unorganized counties.

[5] This is not a typographical error. The Vermont statute of 1915 establishes prohibition in 1927.

III. States which have Local Option, with the Year in which the Present Law was adopted.

California, 1911–
Connecticut, 1872–
Delaware, 1907–[1]
Illinois, 1907–
Kentucky, 1894–
Louisiana, 1855–
Massachusetts, 1875–
Minnesota, 1905–
Missouri, 1887–
Ohio.
New York, 1896–
Rhode Island, 1889–
Texas, 1876–
Utah, 1911–
Vermont, 1903–
Wisconsin, 1889–

IV. States having no Provision for Prohibition or Local Option.

Maryland.[2]
New Jersey.
Pennsylvania.

[1] Delaware has county option; all the other States here enumerated have either municipal option or a combination of county and municipal option.

[2] Maryland allows certain counties to exercise a local option as to the sale of intoxicants, but in the rest of the State there is no provision for either prohibition or local option.

Appendix B.

Constitutional Provisions concerning the Liquor Traffic.

Alabama, Art. IV, Sec. 104. The Legislature shall pass general laws for the cases enumerated in this section, provided that nothing in this section or article shall affect the right of the Legislature to enact local laws regulating or prohibiting the liquor traffic; but no such local law shall be enacted unless notice shall have been given as required in Section 106 of this Constitution.

Art. VIII, Sec. 191. It shall be the duty of the Legislature to pass adequate laws giving protection against the evils arising from the use of intoxicating liquors at all elections.

This section of the Constitution of 1901 is substantially identical with Article VIII, section 6, of the Constitution of 1875, and with Article VII, Section 6, of the Constitution of 1867.

Arizona, Art. XXIII, Sec. 1. Ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall not be manufactured in or introduced into the State of Arizona under any pretense. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the State of Arizona, or who manufactures, or introduces into, or attempts to introduce into the State of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be imprisoned for not less than ten days nor more than two years and fined not less than twenty-five dollars and costs and not more than three hundred dollars and costs for each offense; provided, that nothing in this amendment contained shall apply to the manufacture or sale of denatured alcohol.

Art. XXIII, Sec. 2. The legislature shall by appropriate legislation provide for the carrying into effect of this amendment.

Art. XXIII, Sec. 3. This amendment shall take effect on, and be in force on and after the first day of January, 1915.

Originated by initiative petition, July 2, 1914.
Adopted at the general election, November 3, 1914.
Effective, January 1, 1915.

Art. XXIV, Sec. 1. It shall be unlawful for any person in the State of Arizona, to receive, or cause to be received, from without the State of Arizona, for any purpose, any ardent spirits, ale, beer, wine or intoxicating liquors of any kind, and it shall be unlawful for any person in the State of Arizona to have in his possession, for any purpose, any ardent spirits, ale, beer, wine, or intoxicating

liquors of any kind, which he has introduced or caused to be introduced into the State of Arizona, and it shall be unlawful for any person to transport or cause to be transported, within the State of Arizona, any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind, provided, that it shall be lawful for any regularly ordained priest or clergyman of an established church to receive, transport and possess wine to be used only for sacramental purposes, and provided further, that the University of Arizona, through its Board of Regents, may introduce, receive, transport and possess grain alcohol for scientific uses, and may use and may distribute such alcohol under such restrictions and regulations as said Board of Regents may from time to time adopt, to other institutions of research and learning, for scientific uses. And provided further, that nothing herein shall prevent the introduction, transportation and possession of denatured alcohol.

Art. XXIV, Sec. 2. Every person who shall violate any provision of section one of this article or any rule or regulation made thereunder, shall be guilty of a misdemeanor, and shall be imprisoned for not less than ten days, nor more than two years, and fined not less than twenty-five dollars and costs, and not more than three hundred dollars and costs for each offense; and the liquors received, transported or possessed in violation of section one of this article or manufactured, introduced, or disposed of in violation of Article XXIII of this constitution, shall be by the court ordered publicly destroyed.

Originated by initiative petition, July 6, 1916.
Adopted at the general election, November 7, 1916.
Effective, December 8, 1916.

Colorado, Art. XXII. From and after the first (1st) day of January, 1916, no person, association or corporation shall, within the state, manufacture for sale or gift any intoxicating liquors; and no person, association or corporation shall import into this state any intoxicating liquors for sale or gift; and no person, association or corporation shall, within this state, sell or keep for sale any intoxicating liquors or offer any intoxicating liquors for sale, barter or trade; *Provided, however*, That the handling of intoxicating liquors for medicinal or sacramental purposes may be provided for by statute.

Art. XXII, Sec. 2. All provisions of the Constitution in conflict herewith are hereby repealed.

Originated by initiative petition.
Adopted by vote of the people, November 3, 1914.
Effective, January 1, 1916.

Delaware, Art. XIII, Sec. 1. The General Assembly may from time to time provide by law for the submission to the vote of the qualified electors of the several districts of the State, or any of them,

mentioned in Section 2 of this Article, the question whether the manufacture and sale of intoxicating liquors shall be licensed or prohibited within the limits thereof; and in every district in which there is a majority against license, no person, firm or corporation shall thereafter manufacture or sell spirituous, vinous or malt liquors, except for medicinal or sacramental purposes, within said district, until at a subsequent submission of such question a majority of votes shall be cast in said district for license. Whenever a majority of all the members elected to each House of the General Assembly by the qualified electors in any district named in Section 2 of this Article shall request the submission of the question of license or no license to a vote of the qualified electors in said district, the General Assembly shall provide for the submission of such question to the qualified electors in such district at the next general election thereafter.

Art. XIII, Sec. 2. Under the provisions of this Article, Sussex County shall comprise one district, Kent County one district, the City of Wilmington, as its corporate limits now are or may hereafter be extended, one district, and the remaining part of New Castle County one district.

Art. XIII, Sec. 3. The General Assembly shall provide necessary laws to carry out and enforce the provisions of this Article, enact laws governing the manufacture and sale of intoxicating liquors under the limitation of this Article, and provide such penalties as may be necessary to enforce the same. — *Constitution of 1897.*

Florida, Art. XIX, Sec. 1. The manufacture, sale, barter or exchange of all alcoholic or intoxicating liquors and beverages, whether spirituous, vinous or malt, are hereby forever prohibited in the State of Florida, except alcohol for medical, scientific or mechanical purposes, and wine for sacramental purposes; the sale of which alcohol and wine for the purposes aforesaid, shall be regulated by law.

Sec. 2. The Legislature shall enact suitable laws for the enforcement of the provisions of this article.

Sec. 3. This article shall go into effect on the first day of January, A. D. 1919.

Originated in the Legislature, 1917.
Adopted by vote of the people, November 5, 1918.
Effective, January 1, 1919.

Idaho, Art. III, Sec. 26. From and after the first day of May in the year 1917, the manufacture, sale, keeping for sale, and transportation for sale of intoxicating liquors for beverage purposes are forever prohibited. The legislature shall enforce this Section by all needful legislation.

Originated in the Legislature, January 20, 1915.
Adopted by the people, November 7, 1916.
Effective, May 1, 1917.

KANSAS, Art. XV, Sec. 10. The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific and mechanical purposes.

Originated in the Legislature, 1879.
Adopted by the people, November 2, 1880.

KENTUCKY, Sec. 59. The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

. . . . . .

Twenty-seventh: To provide a means of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquors, or alter the liquor laws.

. . . . . .

Sec. 60. The General Assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county; but laws repealing local or special acts may be enacted. No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law, nor where the Courts have jurisdiction to grant the same or to give the relief asked for. No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes, or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution.

Sec. 61. The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days. — *Constitution of 1891.*

LOUISIANA, Art. 181. The regulation of the sale of alcoholic or spirituous liquors is declared a police regulation, and the General Assembly may enact laws regulating their sale and use.

The above article from the Constitution of 1913 is identical with Article 181 of the Constitution of 1898.

Art. 205. The General Assembly shall by law forbid the giving or selling of intoxicating drinks, on the day of any election, or primary election, within one mile of any polling place. — *Constitution of 1913.*

Article 190 of the Constitution of 1879 is substantially identical with Article 205 of the Constitution of 1898.

MAINE, Amendment XXVI. The manufacture of intoxicating liquors, not including cider, and the sale and keeping for sale of intoxicating liquors, are and shall be forever prohibited. Except, however, the sale and keeping for sale of such liquors for medicinal and mechanical purposes and the arts, and the sale and keeping for sale of cider may be permitted under such regulations as the Legislature may provide. The Legislature shall enact laws with suitable penalties for the suppression of the manufacture, sale and keeping for sale of intoxicating liquors, with the exceptions herein specified.

Originated in the Legislature, February 21, 1883.
Adopted by the people, September 8, 1884.
Effective, first Wednesday in January, 1885.

MICHIGAN, Art. IV, Sec. 47. The Legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors.

The above section in the Constitution of 1850 was repealed by vote of the people at the general election, November, 1876.

Art. XVI, Sec. 11. The manufacture, sale, keeping for sale, giving away, bartering or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, except for medicinal, mechanical, chemical, scientific or sacramental purposes shall be after April 30th, 1918, prohibited in the state forever. The legislature shall by law provide regulations for the sale of such liquors for medicinal, mechanical, chemical, scientific and sacramental purposes.

Originated by initiative petition.
Adopted at the election, November 7, 1916.
Effective, April 30, 1918.

NEBRASKA, Prohibition Amendment. On and after May 1, 1917, the manufacture, the sale, the keeping for sale or barter, the sale or barter under any pretext of malt, spirituous, vinous or other intoxicating liquors, are forever prohibited in this state, except for medicinal, scientific, or mechanical, or sacramental purposes.

Originated by initiative petition.
Adopted at the general election on November 7, 1916.
Effective, May 1, 1917.

New Mexico, Art. XXIII, Sec. 1. From and after the first day of October, A.D. nineteen hundred and eighteen, no person, association or corporation, shall, within this State, manufacture for sale, barter or gift, any ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol; and no person, association, or corporation shall import into this State any of such liquors or beverages for sale, barter or gift; and no person, association or corporation, shall, within this State, sell, or barter, or keep for sale or barter any of such liquors or beverages, or offer any of such liquors or beverages for sale, barter or trade; *provided*, nothing in this section shall be held to apply to denatured or wood alcohol, or grain alcohol when intended and used for medicinal, mechanical or scientific purposes only, or to wine, when intended and used for sacramental purposes only.

Art. XXIII, Sec. 2. Until otherwise provided by law, any person violating any of the provisions of section one (1) of this article, shall, upon conviction, be punished by a fine of not less than fifty dollars, nor more than one thousand dollars, or shall be imprisoned in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment, and upon conviction for a second and subsequent violation of said section such person shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned in the county jail or State penitentiary for a term of not less than three months nor more than one year.

Originated in the Legislature, February 20, 1917.
Adopted by the people, November 6, 1917.

North Dakota, Art. XX, Sec. 217. No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof.

Adopted as a part of the first Constitution of the State, October 1, 1889.
Effective, November 2, 1889.

Ohio, Art. XV, Sec. 9. The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes.

Originated by initiative petition in 1918.
Adopted by vote of the people, November 5, 1918.
Effective, May 27, 1919.

Oklahoma, Art. I, Sec. 7. The manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of the State, heretofore known as the Indian Territory and the Osage Indian Reservation, and within any other parts of the State which existed as Indian reservations on the first day of January, Nineteen Hundred and Six, is prohibited for a period of twenty-one years from the date of the admission of the State into the Union, and thereafter until the people of the State shall otherwise provide by amendment of this Constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to provisions of this section, or who shall, within the above described portions of the State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of the State into the portions herein-before described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense; Provided, that the Legislature may provide by law for one agency under the supervision of the State in each incorporated town of not less than two thousand population in the portions of the State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of the State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale for industrial purposes of alcohol which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of the State hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered,

and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of the State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which, after his own personal diagnosis, he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars, or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency, who shall be convicted of making any sale or other disposition of liquor contrary to these provisions, shall be punished by imprisonment for not less than one year and one day. Upon the admission of the State into the Union these provisions shall be immediately enforcible in the courts of the State.

Submitted by the Constitutional Convention of 1907.
Adopted by vote of the people, September 17, 1907.
Effective, November 16, 1907.

OREGON, Art. I, Sec. 36. From and after January first, 1916, no intoxicating liquors shall be manufactured, or sold within this State, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

This section is self-executing, and all provisions of the Constitution and laws of this State and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed.

Originated by initiative petition.
Adopted at the general election, November 3, 1914.
Effective, January 1, 1916.

Art. I, Sec. 36*a*. No intoxicating liquors shall be imported into this State for beverage purposes.

This section is self-executing and all provisions of the Constitution and laws of this State and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed.

Originated by initiative petition, July 6, 1916.
Adopted at the general election, November 7, 1916.
Effective, December 5, 1916.

RHODE ISLAND, Amendment V. The manufacture and sale of intoxicating liquors to be used as a beverage shall be prohibited. The general assembly shall provide by law for carrying this article into effect.

Originated in the General Assembly, 1885.
Adopted by vote of the people, April 7, 1886.

Amendment VIII. Article V of the amendments to the constitution of this State is hereby annulled.

Originated in the General Assembly, March 13, 1889.
Adopted by vote of the people, June 20, 1889.

South Carolina, Art. VIII, Sec. 11. In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower State, county and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same. — *Constitution of 1895.*

Art. XI, Sec. 12. All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this Article; and if after said application there should be a surplus, it shall be devoted to public school purposes, and apportioned as the General Assembly may determine: *Provided, however*, That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided. — *Constitution of 1895.*

South Dakota, Art. XXIV. No person or corporation shall manufacture, or aid in the manufacture for sale, any intoxicating liquor; no person shall sell or keep for sale, as a beverage any intoxicating liquor. The legislature shall by law prescribe regulations for the enforcement of the provisions of this section and provide suitable and adequate penalties for the violation thereof.

Adopted, October 1, 1889, as a part of the first Constitution of the State of South Dakota.
Effective, November 2, 1889.

This article was repealed by a vote of the people at the general election of 1896 in answer to the following question submitted by the Legislature: Shall Article twenty-four of the Constitution be repealed?

Art. XXIV, Sec. 1. No person, firm, club, association or corporation within this state, shall, on or after the first day of July, 1917, make, brew, distil or manufacture, or aid in making, brewing, distilling or manufacturing, for sale, barter, trade, gift or beverage purposes, any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors, or any mixtures or compound which in part consists of intoxicating liquors, except as hereinafter provided.

No person, firm, club, association or corporation within this State, shall, on or after the first day of July, 1917, import or aid in importing into this state for sale, barter, trade, or gift, nor sell or aid in selling, nor offer for sale, barter, or trade or aid in offering for sale, barter, or trade, nor give away or furnish or aid in giving away or furnishing, nor keep for sale, barter, trade or gift, or aid in keeping for sale, barter, trade, or gift, any spirituous, vinous, malt, brewed, fermented or other intoxicating liquor or any mixture or compound which in part consists of intoxicating liquors, except as hereinafter provided.

Provided, that nothing in this article contained shall be construed to prohibit the compounding, importation, sale or keeping for sale any spirituous, or vinous, liquors or compounds or mixtures which in part consist of spirituous or vinous liquors in this state for medicinal, mechanical, sacramental or scientific purposes by regularly registered pharmacists, under such regulations and restrictions as the Legislature may prescribe.

Art. XXIV, Sec. 2. The Legislature shall at its next session after the adoption of this article prescribe regulations for the enforcement of the provisions of this article and provide adequate and suitable penalties for the violation thereof.

Originated in the Legislature, 1915.
Adopted at the general election, November 7, 1916.
Effective, July 1, 1917.

Texas, Art. XVI, Sec. 20. The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. — *Constitution of 1876.*

The preceding section has been superseded by the following: —

Sec. 20. The Legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the

commissioner's court of said county) may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

Originated in the Legislature, 1891.
Adopted by a vote of the people, August, 1891.
Effective, September 22, 1891.

VIRGINIA, Art. IV, Sec. 62. The General Assembly shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating, or prohibiting the manufacture or sale of intoxicating liquors.

Adopted by the Constitutional Convention without submission to the people, 1902.
Effective, July 10, 1902.

WEST VIRGINIA, Art. XI, Sec. 4. Laws may be passed regulating or prohibiting the sale of intoxicating liquor within the limits of this State. — *Constitution of 1861–1863.*

Art. VI, Sec. 46. On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State; provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the Legislature may prescribe. The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.

Originated in the Legislature, February 9, 1911.
Adopted at the general election, November, 1912.
Effective, July 1, 1914.

Art. VIII, Sec. 24. The county courts, . . . shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal and police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies; *Provided*, That no license for the sale of intoxicating liquors in any incorporated city, town or village, shall be granted without the consent of the municipal authorities thereof, first had and obtained. . . . Such tribunals as have been heretofore established by the Legislature under and by virtue of the thirty-fourth section of the eighth article of the Constitution of one thousand eight hundred and seventy-two for police

and fiscal purposes, shall, until otherwise provided by law, remain and continue as at present constituted in the counties in which they have been respectively established, and shall be and act as to police and fiscal matters in lieu of the county court created by this article until otherwise provided by law. . . .

Originated in the Legislature, 1879.
Adopted by vote of the people at the general election of 1880.
Effective, January 1, 1881.

Wyoming, Art. XIX, Sec. 1. On and after the first day of January, one thousand nine hundred and twenty the manufacture, sale and keeping for sale of malt, vinous or spirituous (,) wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State. Provided however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section.

Originated in the Legislature, 1917.
Adopted at the general election, November, 1918.

Appendix C.

States now having Statutory Prohibition, with Citations to the Acts establishing it.

Alabama. Acts 1915, No. 1, effective June 30, 1915; No. 9, effective February 10, 1915; No. 10, effective January 27, 1915; No. 491, effective September 25, 1915.

Arkansas. Acts 1915, Act 30, effective February 6, 1915.

Georgia. Acts 1915, extraordinary session, Part I, Title 2, Nos. 2, 3 and 4, effective May 1, 1915.

Indiana. Acts 1917, Chapter 4, effective April 2, 1918.

Iowa. Supplemental Supplement to the Code, 1915, Chapter 6, Section 2382, effective January 1, 1916.

Acts 1917, Chapter 136, effective July 4, 1917.

Mississippi. Acts 1908, Chapter 113, effective December 31, 1908.

Montana. Acts 1917, Chapters 143 and 175, effective December 31, 1918.

Nevada. Initiative Act, approved Nov. 5, 1918.

New Hampshire. Laws, 1917, Chapter 147.

North Carolina. Extra session, 1908, Chapter 71, effective January 1, 1909.

South Carolina. Acts 1915, Nos. 76, effective February 16, 1915, and 102, effective February 20, 1915.

Acts 1916, No. 538, effective March 25, 1916.

Tennessee. Acts 1909, Chapter 10, effective January 1, 1910.

Second extraordinary session, 1913, Chapter 1, effective October 16, 1913.

Chapter 2, effective March 1, 1914.

Chapter 3, effective October 16, 1913.

Acts 1915, Chapter 54, effective June 1, 1915.

Vermont. Acts 1915, No. 171, effective May 1, 1927.

Virginia. Acts 1914, Chapter 15, effective June 18, 1914.

Acts 1916, Chapter 146, effective November 1, 1916.

Washington. Acts 1915, Chapter 2, effective January 1, 1916.

Acts 1917, Chapter 19, effective June 6, 1917.

Appendix D.

States now having Local Option, with Citations to the Constitutions or Statutes establishing it.

California. Acts 1911, Chapter 351, effective April 4, 1911.
Connecticut. Acts 1872, Chapter XCIX, effective September 15, 1872.
Delaware. Constitution of 1897, Article XIII.
Illinois. Acts 1907, page 297, effective July 1, 1907.
Kentucky. Acts 1894, Chapter 52, effective March 10, 1894.
Louisiana. Acts 1855, No. 126.
Massachusetts. Acts 1875, Chapter 99.
Minnesota. Acts 1905, Chapter 10, effective February 14, 1905.
Acts 1913, Chapter 387, effective June 1, 1913.
Acts 1915, Chapter 23, effective March 1, 1915.
Missouri. Acts 1887, page 179, effective June 19, 1887.
New York. Acts 1896, Volume I, Chapter 112, effective March 23, 1896.
Rhode Island. Acts 1889, Chapter 816, effective August 1, 1889.
Texas. Constitution of 1876, Article XVI, Section 20, and an amendment thereto adopted September 22, 1891.
Utah. Acts 1911, Chapter 106, effective May 8, 1911.
Vermont. Acts 1904, No. 115, effective March 1, 1905.
Wisconsin. Acts 1889, Chapter 521, effective April 24, 1889.

Appendix E.

Federal Legislation concerning Liquors in Interstate Commerce.

An Act divesting Intoxicating Liquors of their Interstate Character in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. — *United States Statutes-at-Large,* XXXVII, 699.

Note. — The above law, popularly known as the Webb-Kenyon Act, was interpreted in Adams Express Co. *v.* Kentucky (1915), 238 U. S. 190, and was declared constitutional in Clark Distilling Co. *v.* Western Maryland Ry. Co. (1917), 242 U. S. 311.

Chapter 162.

An Act making Appropriations for the Service of the Post Office Department for the Fiscal Year ending June Thirtieth, Nineteen Hundred and Eighteen, and for Other Purposes.

Sec. 5. That no letter, postal card, circular, newspaper, pamphlet, or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of an order or orders for said liquors, or any of them, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier, when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any State or Territory of the United States at which it is by the law in force in the State or Territory at that time unlaw-

ful to advertise or solicit orders for such liquors, or any of them, respectively.

If the publisher of any newspaper or other publication or the agent of such publisher, or if any dealer in such liquors or his agent, shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year. Any person violating any provision of this section may be tried and punished, either in the district in which the unlawful matter or publication was mailed or to which it was carried by mail for delivery, according to direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: *Provided*, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State: *Provided further*, That the Postmaster General is hereby authorized and directed to make public from time to time in suitable bulletins or public notices the names of States in which it is unlawful to advertise or solicit orders for such liquors.

Approved, March 3, 1917.

— *Statutes of the United States of America passed at the Second Session of the Sixty-Fourth Congress, 1916–1917*, Part I, 1058, 1069.

Appendix F.

The Federal Prohibition Amendment.

By a vote of 65 to 20 in the Senate and of 282 to 128 in the House of Representatives, the following amendment was submitted to the States in December, 1917, and its ratification was completed by the necessary number of States in January, 1919.

Article of Amendment..

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.

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—— Congressional Record, LII, 495–616 (December 22, 1914), contains the discussion of the Hobson prohibition amendment.

BULLETIN No. 33

WOMAN SUFFRAGE IN THE UNITED STATES

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WOMAN SUFFRAGE IN THE UNITED STATES.

I. Introduction.

Qualifications for voting in the United States are determined by the several States and not by the national government. Subject to the limitation of the Federal Constitution that the franchise shall not be abridged because of race, color or previous condition of servitude, each State fixes its own qualifications for national, State and local elections. In most of the States the State constitution provides only for male suffrage in the election of such officers as are created by the constitution itself. There are a few States, however, in which constitutional amendments have recently been adopted permitting women to vote in all elections on equal terms with men, while in a number of States women have been given by statute a limited right to vote in school and local elections and for certain statutory offices not provided for in the constitution.

There are two methods, therefore, by which the franchise has been extended to women in the various commonwealths: first, by constitutional amendment, which has been the method followed in those States where women have been given full rights of suffrage; and secondly, by statute, which has been the method usually employed in those States where women have been granted only a partial or limited right of suffrage.

II. Early History of Woman Suffrage in the United States.

The first State in which women exercised the right to vote in this country was New Jersey, where women were admitted to the electorate for a brief period from 1790 to 1807. The New Jersey Constitution of 1776, without any mention of sex as a qualification, conferred the franchise on "all inhabitants of this Colony of full age, who are worth fifty pounds proclamation money. . . ."[1] In revising the election laws in 1790, the Legislature used the terms "he or she" in referring to voting qualifications, thus construing the Constitution so as to include women in the electorate. In 1807, however, the election laws

[1] *Constitution of New Jersey, 1776*, Art. IV.

were so amended as to limit the suffrage to "white male citizens," and women were deprived of the privilege of voting, which appears to have been used by them only to a slight extent.[1]

The first attempt to extend the suffrage to women on a permanent basis, however, was in school elections. The Kentucky Legislature as early as 1838 enacted a law conferring school suffrage upon widows and unmarried women who owned property subject to taxation for school purposes,[2] but it remained for Kansas in 1861 to be the first State to grant school suffrage to all women.[3] This was next done in Michigan in 1867.[4] In 1869 the Legislative Assembly of the Territory of Wyoming went much farther and enacted a law providing that women should have the right to vote at all elections and to hold office on equal terms with men.[5] A similar law was enacted in Utah in 1870,[6] but this act was annulled by Congress in 1887.[7] In 1875 school suffrage was granted to women in Minnesota.[8] Similar action was taken in Colorado in 1876,[9] in New Hampshire in 1878,[10] in Massachusetts in 1879,[11] in New York[12] and Vermont[13] in 1880, in Nebraska[14] and the Territory of Dakota[15] in 1883, and in New Jersey[16] and the Territory of Montana[17] in 1887. In 1878 Mississippi authorized women who were "patrons" of schools to vote in school elections,[18] and in 1883 Oregon conferred school suffrage upon women who paid school taxes.[19] In 1883 the Territory of Washington granted equal suffrage to women,[20] but in 1888 this act was declared

[1] *Woman Suffrage in Practice*, edited by the International Woman Suffrage Alliance, London, 1913, p. 31; *The History of Woman Suffrage*, edited by Susan B. Anthony and Ida H. Harper, Rochester, N. Y., 1902, IV, 830. See also Carpenter *v.* Cornish (1912), 83 N. J. Law, 254.

[2] *Acts of Kentucky, 1837–1838*, Chap. 898, sec. 37.

[3] *General Laws of Kansas, Session of 1861*, Chap. LXXVI, Art. III, sec. 2.

[4] *Acts of the Legislature of Michigan of 1867*, I. 146.

[5] *Laws of the Territory of Wyoming, 1869*, Chap. 31.

[6] *Acts, Resolutions and Memorials of the Territory of Utah, 1870*, 8.

[7] *U. S. Statutes at Large*, XXIV, 639.

[8] By constitutional amendment. See *General Laws of Minnesota, 1875*, 18.

[9] *Constitution of Colorado* (1876), Art. VII, sec. 1.

[10] *Laws of New Hampshire, 1878*, Chap. 46.

[11] *Acts and Resolves of Massachusetts, 1879*, Chap. 223.

[12] *Laws of New York, 1880*, I, Chap. 9.

[13] *Acts and Resolves of Vermont, 1880*, No. 103.

[14] *Laws, Joint Resolutions and Memorials of Nebraska, 1883*, Chap. LXXII, sec. 2.

[15] *Laws of the Territory of Dakota, 1883*, Chap. 44, sec. 66; *Ib., 1887*, Chap. 47, sec. 27.

[16] *Acts of New Jersey, 1887*, Chap. CXVI.

[17] *Compiled Statutes of Montana, 1887*, sec. 1880.

[18] *Laws of Mississippi, 1878*, Chap. 14, sec. 31.

[19] *Laws of Oregon, 1878*, 67.

[20] *Laws of the Territory of Washington, 1883*, 39.

unconstitutional by the Supreme Court of the Territory.[1] Upon its admission to the Union in 1889 Montana extended to all duly qualified woman tax payers the right to vote upon all questions submitted only to tax payers.[2]

From this summary it is apparent that by 1890 school suffrage had been granted to women in fourteen States and Territories, while in Montana woman tax payers could vote upon all questions submitted to taxpayers. In one jurisdiction, the Territory of Wyoming, women possessed the right to vote in all elections and to hold office upon the same terms as men.

III. The Present Status of Woman Suffrage.[3]

1. *Equal Suffrage States.*

In 1890 the Territory of Wyoming was admitted into the Union with a constitution which provided that women should continue to have equal voting rights with men, so that Wyoming may be regarded as the first equal suffrage State. Since 1890, fourteen other States have adopted constitutional provisions establishing the principle of equal suffrage, making a total of fifteen States in which women have the same rights as men in voting and holding public office. These States are as follows: Wyoming (1890); Colorado (1893); Utah (1896); Idaho (1896); Washington (1910); California (1911); Arizona (1912); Kansas (1912); Oregon (1912); Montana (1914); Nevada (1914); New York (1917); Michigan (1918); Oklahoma (1918); and South Dakota (1918).[4] The Territory of Alaska (1913) has also given women equal suffrage,[5] while Arkansas by an act of 1917 and Texas by an act of 1918 have conferred upon women the right to vote in all primary elections, which in a one-party State is essentially as important as the right to vote at regular elections.[6]

Geographically New York is the only eastern State which

[1] Bloomer *v.* Todd *et al.* (1888), 3 Washington Terr. Rep. 599.

[2] *Constitution of Montana* (1889), Art. IX. sec. 12.

[3] For table showing present status of woman suffrage in the United States see Appendix A.

[4] References to Constitutions: Wyoming, VI, Suffrage 1; Colorado, VII, 1; Utah, IV, 1; Idaho, VI, 2; Washington, VI, 1; California, II, 1; Arizona, VII, 2; Kansas, V, 8; Oregon, II, 2; Montana, IX, 2; Nevada, II, 1; New York, Art. II, Sec. 1, amendment adopted Nov. 6, 1917; Michigan, III, 1 (amended, 1918); Oklahoma, III, 1 (amended, 1918); and South Dakota, VII, 1 (amended, 1918). For text of constitutional provisions see Appendix D.

[5] *Session Laws, Resolutions and Memorials of the Territory of Alaska, 1913*, Chap. 1.

[6] *Public and Private Acts of tye Forty-first General Assembly of Arkansas*, 1, 1017; *General and Special Laws of the State of Texas passed at the Fourth Called Session of the Thirty-fifth Legislature, 1918*, 61.

has granted equal suffrage to women. The other equal suffrage States except Michigan are located west of the Mississippi River and include the entire western set of States with the exception of North Dakota.

In a number of other commonwealths the question of equal suffrage has been defeated on submission to a popular referendum. The States in which the proposal has been rejected at the polls and not subsequently adopted include the following: Rhode Island (1887); New Hampshire (1903); Wisconsin (1912); Missouri, Nebraska, North Dakota (1914); Delaware,[1] Massachusetts, New Jersey, Pennsylvania, (1915); Iowa, West Virginia (1916); and Maine (1917). Ohio has referred the question to the voters on three different occasions without success, in 1912, 1914, and 1917.[2] In Michigan at three elections (1874, 1912, 1913) and in South Dakota at four elections (1890, 1898, 1914, 1916,) the voters rejected the measure, but finally adopted it in 1918.[3]

2. *Partial Suffrage States.*

In addition to the fifteen States above mentioned which have given equal suffrage to women by constitutional provision, there are five States which have recently granted women partial suffrage by statute. The first of these States is Illinois, which in 1913 enacted a law giving women the right to vote for certain statutory offices not provided for in the Constitution. In fixing the qualifications for voting, the Constitution of Illinois follows the practice of most of the other States, and provides only for the granting of suffrage to males. On the principle that the suffrage qualifications of the Constitution apply only to the election of such officers as are created by the Constitution itself, the act of 1913 was passed conferring upon women the right to vote for presidential electors and for a number of offices which are established merely by statute, such as members of the State board of equalization, clerk of the appellate court, county collector, county surveyor, members of the board

[1] A constitutional amendment for equal suffrage in Delaware was defeated by the Legislature, which has power to amend the constitution without submitting the proposed amendment to the voters.

[2] The measure defeated in Ohio in 1917 provided for only partial suffrage.

[3] Data as to rejected amendments compiled from *American Year Book*, 1910–1916; and Hart and McLaughlin's *Cyclopedia of American Government*, III, 697.

of assessors (county), members of the board of review (county), and for all officers of cities, villages and towns (except police magistrates).[1] The constitutional power of the Legislature to permit women to vote for presidential electors and for offices which have been authorized by statute was upheld by the Illinois Supreme Court in the case of Scown *v.* Czarnecki (1914), 264 Ill. 305. In this case the court held that the qualifications of electors prescribed by section 1 of article 7 of the Constitution apply to the elections provided for in that instrument but do not apply to other elections provided for only by statute, and which are therefore wholly within the control of the Legislature. Hence the Woman's Suffrage Act of 1913 (Laws of 1913, p. 333) does not violate section 1 of article 7 of the Constitution, as all offices mentioned in such act are within the control of the Legislature, none of them being of constitutional origin, and it is competent for the Legislature to declare the manner of filling them and by whom the incumbents shall be elected. In support of these positions the court cited People *v.* English (1892), 139 Ill. 622, and Plummer *v.* Yost (1893), 144 Ill. 68.[2]

Following the example of Illinois the Legislature of Rhode Island during the year 1917 enacted a law giving women the right to vote for presidential electors,[3] while in the same year the Legislatures of Michigan,[4] Nebraska,[5] and North Dakota[6] passed statutes making it possible for women to vote for municipal officers as well as for presidential electors. Indiana[7] and Ohio[8] in 1917 also enacted partial suffrage laws — the Ohio law providing only for presidential suffrage, while the Indiana law went much farther and permitted women to vote not only for presidential electors but also for county and municipal officers, for all elective officials not provided for in the Constitution and for delegates to the Constitutional Convention. The Indiana statute, however, has recently been declared unconstitutional

[1] *Laws of Illinois, 1913*, 333. For text of the Illinois partial suffrage law, see Appendix E.

[2] See also People *ex rel* Kastning *v.* Militzer *et al.* (1916), 272 Ill. 387 and Franklin *v.* Westfall (1916), 273 Ill. 402.

[3] *Laws of Rhode Island, 1917*, 98. See Appendix E for text of Rhode Island partial suffrage act.

[4] *Laws of Michigan, 1917*, 378. This has been superseded by the amendment of 1918.

[5] *Laws of Nebraska, 1917*, 95.

[6] *Laws of North Dakota, 1917*, 405. See Appendix E for text of the partial suffrage act of North Dakota.

[7] *Laws of Indiana, 1917*, 73.

[8] *Legislative Acts and Joint Resolutions of the Eighty-second General Assembly of Ohio*, 7.

by the Supreme court of that State on the ground that the Constitution specifically describes voters as "male citizens," while the Ohio law was suspended from operation by the filing of a referendum petition and was subsequently defeated by the voters on November 6, 1917. All of the partial suffrage States except Rhode Island have for some time permitted women to vote in school elections, while Michigan has since 1908 allowed women taxpayers to vote on questions of local taxation and indebtedness and on the granting of franchises.[1]

The movement to give women the privilege of voting for presidential electors and for other officers not provided for in the State constitution is a comparatively recent one as is shown by the fact that all of the laws of this nature except that of Illinois were adopted in the year 1917.

3. *School Suffrage States.*

There are at present twelve States in which woman suffrage is permitted only in school elections. These States are as follows: Kentucky (1838, 1893),[2] Minnesota (since 1875),[3] New Hampshire (since 1878),[4] Massachusetts (since 1879),[5] Mississippi (since 1878),[6] Vermont (since 1880),[7] New Jersey (since 1887),[8] Connecticut (since 1893),[9] Ohio (since 1894),[10] Delaware (since 1898,[11] Wisconsin (since 1900),[12] and New Mexico (1910, 1912).[13]

In most of the school-suffrage States the privilege is given to all women. In several, however, it is limited to certain persons, as in Kentucky, where only widows with children of school age may vote; in Mississippi, where the trustees of certain schools are elected by the "patrons" of the school;[14] and in Delaware, where the privilege of voting in such elections is conferred only upon women who are taxpayers. In New Jersey the right to

[1] *Constitution of Michigan*, Art. III, sec. 4.
[2] *Laws of Kentucky, 1893*, p. 1448.
[3] *Constitution of Minnesota*, VII, 8.
[4] *Laws of New Hampshire, 1878*, 176.
[5] *Acts and Resolves of Massachusetts, 1879*, 559.
[6] *Laws of Mississippi, 1878*, Chap. 14, sec. 31.
[7] *Laws of Vermont, 1880*, 102.
[8] *Laws of New Jersey, 1887*, 149; *Laws of New Jersey, Second Special Session, 1903*, 31.
[9] *Public Acts of Connecticut, 1889–95*, 411.
[10] *Laws of Ohio, 1894*, 182.
[11] *Laws of Delaware, 1898*, 179.
[12] *Laws of Wisconsin, 1899*, 389.
[13] *Constitution of New Mexico*, VII, 1.
[14] *Laws of Mississippi, 1894*, ch. 65; *Ib., 1914*, ch. 187.

vote in school elections has been restricted by a decision of the State Supreme Court to the privilege of voting only on appropriations.[1]

4. *Taxpaying Suffrage States.*

Finally in two States — Iowa (1894)[2] and Louisiana (1898)[3] — woman suffrage is extended merely to taxpayers. In Iowa, women who pay taxes may vote at school or municipal elections upon any proposition to issue bonds or increase the tax levy, while in Louisiana, women who are similarly qualified may vote upon all questions submitted to the taxpayers as such.

5. *Summary.*

Thus it appears that in thirty-five States of the Union and in the Territory of Alaska the franchise has been extended to women in some form. In fifteen States — Arizona, California, Colorado, Idaho, Kansas, Michigan, Montana, Nevada, New York, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming — women have equal suffrage and may vote in all elections, national, State and local. In four States — Illinois, Nebraska, North Dakota and Rhode Island — they have a partial right of suffrage which includes in each State the privilege of voting for presidential electors and school officers and sometimes for municipal and other minor officers as well. In twelve States — Connecticut, Delaware, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, Ohio, Vermont and Wisconsin — women may vote in school elections alone, while two States — Iowa and Louisiana — woman suffrage extends only to women taxpayers who may vote on questions of indebtedness, taxation or the expenditure of public money. In two States — Arkansas and Texas — woman suffrage is confined to primary elections alone. In the remaining thirteen States — Alabama, Florida, Georgia, Indiana, Maine, Maryland, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia — the franchise is not given to women in any form whatsoever.[4]

[1] *Compiled Statutes of New Jersey*, IV, 4750, sec. 82; Kimball *v.* Hendee (1894), 57 N. J. Law, 307; Chamberlain *v.* Cranbury (1895), 57 N. J. Law, 605.

[2] *Laws of Iowa, 1894*, 47.

[3] *Constitution of Louisiana*, Art. 199.

[4] For table showing present status of woman suffrage in the United States see Appendix A.

IV. Woman Suffrage in Massachusetts.[1]

In Massachusetts, women may vote only for members of school committees in cities and towns, although there have been numerous proposals to extend the suffrage to the election of other officers. In fact, the question of extending the franchise to women has been brought to the attention of the General Court at almost every session since the middle of the nineteenth century. As early as 1849 a petition was presented to that body proposing equal suffrage, but no action was taken. Again in 1853 a petition was presented to the Constitutional Convention of that year praying that the word "male" be stricken from the Constitution and a hearing was given, but it was deemed inexpedient to act on the matter.[2] From 1868 to 1878 the question of granting the suffrage to women in some form was put to a vote at every session with the exception of that of 1874. The first definite result of the movement, however, was the enactment of a law in 1879 giving women the right to vote for members of school committees.[3]

From 1880 to 1900 proposed legislation or constitutional amendments providing for municipal suffrage, presidential suffrage, or complete suffrage were introduced at every session of the Legislature except that of 1883, but were defeated whenever submitted to a vote of that body. Finally in 1914 and 1915 a proposed amendment to the Constitution granting equal suffrage to women received the necessary majorities in both the House and Senate and was referred to the voters at the State election in 1915.[4] This proposal was defeated at the polls, however, by a vote of 295,939 to 162,492.[5]

In 1917 a bill (House Bill No. 797) was introduced into the Massachusetts House of Representatives proposing to amend Chapter 98 of the General Acts of 1916 so as to give women the right to vote on such amendments as might be submitted to the people by the Constitutional Convention of that year. The Senate thereupon asked the opinion of the Justices of the Supreme Judicial Court as to the validity of such a measure.

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[1] For a chronology of woman suffrage in Massachusetts, see Appendix C.
[2] *Journal of the Constitutional Convention of 1853*, 216–218.
[3] *Acts and Resolves of Massachusetts, 1879*, 559.
[4] *Acts and Resolves of Massachusetts, 1914*, 1055.
[5] *Public Document (Mass.) No. 43 (1915)*, 392.

The Justices took the view that the proposed bill was beyond the power of the Legislature since the Constitution as it now stands gives only males the right to vote in State elections. In their opinion the Justices said: [1]

The first four questions, some in general and others in specific forms of expression, are construed as intended to ask in substance whether the General Court has the power to amend St. 1916, c. 98, as proposed by the accompanying House Bill No. 797. St. 1916, c. 98, provides for the holding of a convention to revise, alter or amend the Constitution of the Commonwealth if a majority of those voting on the question vote in favor. It is common knowledge that proclamation has been made to the effect that a majority of the votes cast were in favor of holding the convention. It is enacted in § 6 of that act that "Any such revision, alterations or amendments, when made and adopted by the said convention, shall be submitted to the people for their ratification and adoption, in such manner as the convention shall direct; and if ratified and adopted by the people in the manner directed by the convention, the Constitution shall be deemed and taken to be revised, altered or amended accordingly." House Bill No. 797 purports to enact that "All women entitled to register to vote for school committee shall be regarded as people within the meaning of the word" "people" as used in § 6 of the act.

The validity and the powers of this convention are not necessarily involved in these questions. Without discussing that subject, we are of opinion that, assuming the validity of St. 1916, c. 98, it is plain that the passage of the proposed bill is wholly beyond the power of the Legislature. If the convention to revise and alter the Constitution is held under the Constitution, it is because the people of the Commonwealth have under the Constitution the right to alter their frame of government according to orderly methods as provided by law, and through the medium of an act of the Legislature.

The word "people" may have somewhat varying significations dependent upon the connection in which it is used. In some connections in the Constitution it is confined to citizens and means the same as citizens. It excludes aliens. It includes men, women and children. It comprehends not only the sane, competent, law abiding and educated, but also those who are wholly or in part dependents and charges upon society by reason of immaturity, mental or moral deficiency or lack of the common essentials of education. All these persons are secured by the fundamental guarantees of the Constitution in life, liberty and property and the pursuit of happiness, except as these may be limited for the protection of society. It is declared in the Preamble to our Constitution that "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen

[1] Opinion of the Justices to the Senate (1917), 226 Mass. 607.

with the whole people, that all shall be governed by certain laws for the common good." In this sense "people" comprises many who, by reason of want of years, of capacity or of the educational requirements of art. 20 of the Amendments of the Constitution, can have no voice in government and who yet are entitled to all the immunities and protection established by the Constitution. "People" in this aspect is coextensive with the body politic. But it is obvious that "people" cannot be used with this broad meaning in a political signification. The "people" in this connection means that part of the entire body of inhabitants who under the Constitution are entrusted with the exercise of the sovereign power and the conduct of the government. The "people" in the Constitution in a practical sense means those who under the existing Constitution possess the right to the elective franchise and who, while that instrument remains in force unchanged, will be the sole organs through which the will of the body politic can be expressed. "People for political purposes must be considered synonymous with qualified voters." Blair *v.* Ridgely, 41 Mo. 63, 176, 177. Boyd *v.* Thayer, 143 U. S. 135, 158, 161. Cooley, Const. Lim. (7th ed.) 57, 58. See Vol. II Works of James Wilson (Andrews ed.) 6.

The Constitution of Massachusetts in its original form defined the qualifications of the electorate. Const. Mass. c. 1, § 2, art. 2; c. 1, § 3, art. 4. These qualifications have been modified by arts. 3, 17, 20, 28, 31 and 32 of the Amendments. The words of the Constitution as it now stands are "Every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote six calendar months next preceding any election . . . shall have a right to vote" for Governor and other officers. Although these provisions in express terms relate only to the qualifications of voters for the elective officers therein named, it is a necessary and imperative implication that these electors and these only can be treated as qualified to vote to change the Constitution. The words "qualified voters" as used in art. 9 of the Amendments, wherein are the provisions for amendments to the Constitution, mean the voters qualified according to the requirements of the Constitution. It is an essential and inevitable limitation upon the power vested in the legislative body of a State established by a written constitution that it cannot provide for the revision or change of the frame of government except in a lawful and orderly method and by the body of electors determined according to the terms of that frame of government. The "people" who have a right to vote upon any essential aspect of that revision and change, either for members of the convention or the acceptance or rejection of its work, are the people who have a right to vote for State officers and upon State questions, namely, the voters as described by the Constitution itself. It is elementary that the existing Constitution continues in full force and effect until changed or destroyed by act of the sovereign people. It seems indisputable that there is no power under the

Constitution, except the sovereign people acting in accordance with their self-imposed, limiting methods of procedure, to enlarge the electorate so as to include as voters persons not eligible to vote upon amendments to the existing Constitution. This is necessarily so, whatever may be the power of the Legislature to define words for the purpose of its own legitimate enactments. The Legislature can proceed only under the Constitution. It would be contrary to its duty to that Constitution to provide for its revision or alteration by a body of electors, whose qualifications were different from those ascertained by the terms of that Constitution. The power of the Legislature to enact that women may be members of or vote for local or other subordinate boards of officers (see *Opinion of the Justices*, 115 Mass. 602; 136 Mass. 578) is of a different character. The existence of that power touching officers created by the Legislature affords no basis for argument that like power exists to change the electorate established by the Constitution for State affairs. It follows from what has been said that the first four questions must be answered in the negative.

V. Participation of Women at the Polls.

Official statistics as to the extent to which women have actually made use of the ballot are impossible to obtain in most cases. The following table, however, may be of some interest as showing the increase in the number of voters in the equal suffrage States following the adoption of woman suffrage:[1]

State.	Suffrage granted.	Population, 1910.	Males over 21.	Females over 21.	Total over 21.	Vote for President, Men alone.	Vote for President, Men and Women, 1916.
Arizona,	1912	204,354	74,051	43,891	117,942	23,722[2]	58,021
California,	1911	2,377,549	920,397	671,386	1,591,783	386,597[3]	673,527[3]
Colorado,	1893	799,024	271,648	213,425	485,073	93,843[4]	294,375
Idaho,	1896	325,594	110,863	69,818	180,681	19,407[4]	57,914[5]
Illinois,	1913	5,638,591	1,743,182	1,567,491	3,310,673	1,146,173[2]	2,189,349
Kansas,	1912	1,690,949	508,529	438,434	947,463	365,444[2]	629,813
Montana,	1914	376,053	155,017	81,741	236,758	79,910[2]	177,679
Nevada,	1914	81,875	40,026	18,140	58,166	20,115[2]	32,978
Oregon,	1912	672,765	257,188	168,323	425,511	137,040[2]	261,650
Utah,	1896	373,351	104,115	85,729	189,844	112,385[2]	142,762[6]
Washington,	1910	1,141,990	441,294	277,727	719,021	183,879[3]	379,459
Wyoming,	1869	145,965	63,201	28,840	92,041	42,296[2]	51,842[6]

[1] Table compiled from *World Almanac, 1917*, 830, and *Abstract of the Thirteenth Census of the United States*, 1910 (Washington, 1913), 110, 111, 118.

[2] 1912. [4] 1892. [6] No comparison, as women have always voted since Statehood.
[3] 1908. [5] 1900.

In Illinois, separate ballots are provided for men and women so that it is possible to determine somewhat more definitely the extent to which women have availed themselves of the right to vote in that State. An analysis of the vote cast in the municipal election of 1915 shows that 73 per cent of the men and only 44 per cent of the women who were eligible voted in the election. In other words "less than half of the potential women voters availed themselves of their right to participate in the election."[1] In the presidential election of 1916, however, the interest shown by such women as had registered in the city of Chicago appears to have been practically as great as that of the male voters, as is indicated by the following table:[2]

Presidential Election, Chicago, 1916.

	Number registered.	Number voted.	Per Cent voted.
Men, ...	504,674	487,210	96.5
Women, ...	303,801	289,444	95.2

It should be noted, however, that the percentage of women who *actually* registered and voted in the presidential election of 1916 in proportion to the total number of eligible women of voting age who might have so registered and voted is much smaller than in the case of the male voters. Taking the school census of 1914 as a basis, there were in the city of Chicago in 1916 (not including Morgan Park) approximately 549,942 native-born or naturalized women over 21 years of age. Of this number only 303,801, or 55 per cent, registered for the presidential election, while only 289,444, or 52.6 per cent, actually voted in the election. The total number of native-born or naturalized males over 21, on the other hand, was 585,171, of whom 504,674, or 86 per cent, were registered, while 487,210, or 81.5 per cent, actually voted.[3] Looked at from this point of view, the interest shown by the women voters appears to have been less than that shown by the men.

[1] Fred W. Eckert, "Woman Suffrage in the City of Chicago," *Political Science Quarterly*, XXXI, 119–120.

[2] Table compiled from figures given in *The World Almanac, 1917*, 833.

[3] Estimate of number of males and females of voting age taken from *Political Science Quarterly*, Vol. XXXI, 119–120.

A comparison of the total vote cast for President in the entire State of Illinois in 1912 (when men alone could vote) and 1916 (the first year when women could vote in presidential elections) shows the following results: [1]

Presidential Election, Illinois, 1912 and 1916.

Party.	1912 (Men alone).	1916 (Men and Women).		
	Total Vote.	Total Vote.	Men.	Women.
Republican,	253,593	1,152,549	693,334	459,215
Democratic,	405,048	950,229	566,937	383,292
Progressive,	386,478	–	–	–
Socialist,	81,278	61,394	44,219	17,175
Prohibition,	15,710	26,047	9,835	16,212
Socialist Labor,	4,066	2,488	1,682	806
Total for all parties,	1,146,173	2,192,707	1,316,007	876,700

VI. Women Voters in Massachusetts.

Women may vote in certain local elections in Massachusetts upon the same terms as men, and as they register upon a special list and employ a special form of ballot it is possible to determine with exactness the number who register and vote. If it be assumed that the number of women who might register is approximately the same as the number of assessed polls, that is, 887,280, it appears that only 10.7 per cent, or 95,050, registered, and of these only 28,219 actually voted. In other words, less than 4 per cent of the women of the State exercise the voting privileges which they now possess. In twenty-four towns, containing in all 23,139 assessed polls, 9,912 of whom voted, no women voted. In three towns (Dennis, Newbury and Templeton), containing 2,186 assessed polls, 1,218 of whom registered, no women registered. The following tables show the vote in detail in the cities of Massachusetts and in the towns containing more than two thousand assessed polls:

[1] Figures obtained from *The Illinois Blue Book*, 1915–16, edited by the Secretary of State, p. 530, and from *The Official Vote of the State of Illinois, 1916*, compiled by the Secretary of State, pp. 142–144.

Registered Voters and Persons who voted at City Elections in Massachusetts in 1917.

Name of City.	Assessed Polls.	Registered Voters.		Persons who voted.	
	Male.	Male.	Female.	Male.	Female.
Attleboro,	5,430	3,304	355	2,102	16
Beverly,	6,925	4,519	302	2,277	10
Boston,	211,026	116,908	21,518	88,783	16,050
Brockton,	19,896	12,828	4,245	9,668	750
Cambridge,	29,193	16,371	7,764	12,093	829
Chelsea,	13,427	5,822	868	4,311	264
Chicopee,	10,214	4,232	267	3,675	21
Everett,	10,426	6,298	1,137	5,003	15
Fall River,	33,547	16,832	8,252	12,865	735
Fitchburg,	12,374	6,880	2,252	5,622	541
Gloucester,	7,644	4,999	428	3,690	31
Haverhill,	16,020	9,214	1,431	7,283	322
Holyoke,	17,014	9,567	2,844	8,145	19
Lawrence,	22,257	13,163	418	10,897	180
Leominster,	5,562	3,429	518	2,288	101
Lowell,	28,210	16,415	6,427	13,736	2,265
Lynn,	29,823	18,048	2,619	13,679	1,048
Malden,	14,254	8,005	1,253	4,437	31
Marlborough,	4,714	3,450	277	2,951	–
Medford,	10,358	6,882	659	4,294	184
Melrose,	5,061	3,623	376	1,831	31
Methuen,	4,000	2,667	150	2,214	107
New Bedford,	31,724	15,518	1,517	12,455	148
Newburyport,	4,256	3,485	156	2,415	13
Newton,	12,271	7,998	656	1,390	16
North Adams,	5,934	3,947	554	3,091	297
Northampton,	5,365	3,818	557	2,967	57
Peabody,	6,256	3,408	555	2,042	69
Pittsfield,	11,784	8,146	1,106	6,520	253
Quincy,	12,667	7,304	430	3,529	14
Revere,	7,697	4,479	1,135	2,731	428
Salem,	12,999	7,787	1,002	6,375	536
Somerville,	25,563	13,826	1,737	4,980	70
Springfield,	37,583	19,883	1,065	13,990	51
Taunton,	10,842	6,610	799	5,752	165
Waltham,	8,696	5,704	1,833	3,805	95
Woburn,	4,998	3,468	1,846	2,703	543
Worcester,	56,646	27,692	1,516	18,204	63
Total,	772,656	436,529	80,824	315,093	26,368

Registered Voters and Persons who voted at Town Elections in Massachusetts in Towns containing more than 2,000 Assessed Polls in 1917.

Name of Town.	Assessed Polls.	Registered Voters.		Persons who voted.	
	Male.	Male.	Female.	Male.	Female.
Andover,	2,089	1,704	129	777	43
Athol,	3,011	2,180	45	1,791	–
Belmont,	3,445	1,651	205	1,141	105
Braintree,	2,752	1,906	279	989	1
Brookline,	8,815	6,246	844	936	35
Dedham,	2,962	2,110	149	1,109	14
Framingham,	4,818	3,431	798	2,426	209
Gardner,	4,826	2,827	489	2,401	384
Methuen,	3,769	2,524	25	1,563	2
Middleborough,	2,440	1,793	123	895	–
Montague,	2,066	1,409	195	1,120	18
Natick,	3,402	2,720	1,898	2,164	50
Palmer,	2,558	1,405	49	1,057	6
Rockland,	2,225	1,980	693	1,492	2
Saugus,	2,917	1,944	309	990	100
Wakefield,	3,823	2,677	378	1,500	–
Watertown,	4,916	3,288	698	1,924	98
West Springfield,	3,459	2,104	277	1,264	233
Weymouth,	4,027	3,231	619	1,802	23
Winthrop,	3,806	2,865	771	1,283	2
Total,	72,126	49,995	7,973	28,624	1,325

Appendix A.

EXTENT OF WOMAN SUFFRAGE IN THE UNITED STATES, 1918.

Equal Suffrage States.

Wyoming,	1890	Kansas,	1913
Colorado,	1893, 1902	Montana,	1914
Utah,	1896	Nevada,	1914
Idaho,	1896	New York,	1917
Washington,	1910	Michigan,	1918
California,	1911	Oklahoma,	1918
Oregon,	1912	South Dakota,	1918
Arizona,	1912		

To the above States should be added the Territory of Alaska (1913). The Territory of Wyoming established equal suffrage in 1869, and this was continued when it was admitted to the Union in 1890. Woman suffrage was established in Colorado by a statute ratified by popular vote in 1893 and by a constitutional amendment adopted in 1902.

Partial Suffrage States.

Illinois — presidential, municipal and school,	1891, 1913
Nebraska — presidential, municipal and school,	1883, 1917
North Dakota — presidential, county, municipal and school,	1889, 1917
Rhode Island — presidential,	1917

School Suffrage States.

Kentucky,	1838	New Jersey,	1887
Minnesota,	1875	Connecticut,	1893
New Hampshire,	1878	Ohio,	1894
Massachusetts,	1879	Delaware,	1898
Mississippi,	1878	Wisconsin,	1900
Vermont,	1880	New Mexico,	1910

Taxpayers' Suffrage States.

Iowa,	1894
Louisiana,	1898

Primary Suffrage States.

Arkansas,	1917
Texas,	1918

Appendix B.

POPULAR VOTES ON WOMAN SUFFRAGE, 1869–1918.

State.	Date.	Yes.	No.
Arizona,	1912	13,442	6,202
California,	1896	110,355	137,099
	1911	125,037	121,450
Colorado,	1877	6,612	14,053
	1893	35,798	29,451
Delaware,	1915	—[1]	—
Idaho,	1896	12,126	6,282
Iowa,	1916	162,849	172,990
Kansas,	1867	9,070	19,857[2]
	1894	95,302	130,139
	1912	175,246	159,197
Louisiana,	1918	19,573	23,077
Maine,	1917	20,604	38,838
Massachusetts,	1915	162,492	295,939
Michigan,	1874	40,077	135,957[2]
	1912	247,375	248,135
	1913	168,738	264,882
	1918	229,790	195,281
Missouri,	1914	182,257	322,463
Montana,	1914	41,302	37,588[2]
Nebraska,	1871	3,502	12,668
	1882	25,756	50,693
	1914	90,738	100,842
Nevada,	1914	10,936	7,258
New Hampshire,	1903	13,089	21,788
New Jersey,	1915	133,282	184,390
New York,	1915	553,348	748,332
	1917	703,129	600,776
North Dakota,	1914	40,009	49,410[2]
Ohio,	1912	249,420	336,875
	1914	335,390	518,295
	1917	422,262	568,382
Oklahoma,	1910	88,808	128,928
	1918	106,909	81,481

[1] Amendments not submitted to the people. Senate, yeas 29, nays 15; House, yeas 8, nays 22.
[2] Unofficial.

Popular Votes on Woman Suffrage, 1869–1918 — Concluded.

State.	Date.	Yes.	No.
Oregon,	1884	11,223	28,176[1]
	1900	26,265	28,402
	1906	36,902	47,075
	1908	36,858	58,670
	1910	35,270	59,065
	1912	61,265	57,104
Pennsylvania,	1915	385,348	441,034
Rhode Island,	1887	6,889	21,957
South Dakota,	1890	22,972	45,682
	1898	19,698	22,983
	1914	39,605	51,519
	1916	53,432	58,350
	1917	49,213	28,885
Utah,	1896	—[2]	—
Washington,	1889	16,527	35,613
	1898	20,171	30,497
	1910	52,299	29,676
West Virginia,	1916	63,540	161,607
Wisconsin,	1912	135,736	227,054
Wyoming,	1890	—[2]	—

[1] Unofficial.

[2] Suffrage provided for in the original constitution under which the State was admitted to the Union.

Appendix C.

WOMAN SUFFRAGE MEASURES IN MASSACHUSETTS.

Date.	Nature of Measure.	Before what Body.	Vote.	
			Yes.	No.
1849	Memorial presented by H. A. Hardy and others concerning equal rights for women, particularly relating to divorce. A bill reported concerning "Husband and Wife" was laid on the table, ...	House.	–	–[1]
1850	Report, leave to withdraw, on petition of Charles Brigham and others for equal suffrage, ...	House.	–	–
1851	Report, inexpedient to legislate, on sundry petitions of Martin Stowell and others for granting to women right to vote and hold office, ...	House.	–	–
1852	Report, to discharge committee, on petition of Wendell Phillips and others to extend political franchise to women, ...	House.	–	–
1853	Report, leave to withdraw, on petitions of Francis Jackson and others for a constitutional amendment.	Constitutional Convention.	–	–
	Report, inexpedient to legislate, on petition of Wendell Phillips and others that women have right to appear before the Constitutional Convention to plead their cause, .	–	–	–
1857	Report, leave to withdraw, on petition of Sarah E. Wall and others for equal rights, .	House.	–	–
1858	Petitions of Anna Gardner and others for equal rights. Resolve reported relating to "Education;" rejected, ...	House.	–	–[1]
	Petition of Sarah E. Wall and others for right of suffrage. Ordered printed. No further action, ...	Senate.	–	–
1860	Report, leave to withdraw, on petition of Sarah E. Wall and others for extension of franchise to women, ...	Senate.	–	–
1862	Same as above, ...	Senate.	–	–
1867	Report, leave to withdraw, on petition for equal suffrage, ...	House.	–	–
1868	Report, leave to withdraw, on petition to extend suffrage to women. Motion to recommit petition lost, ...	House.	74	119
1869	Resolve for constitutional amendment to secure right of suffrage to women, . .	Senate.	9	22
	Bill for an act to secure elective franchise to women. Leave to introduce bill refused, .	House.	84	111

[1] Rejected, but vote is not given in the Journal.

Woman Suffrage Measures in Massachusetts — Continued.

Date.	Nature of Measure.	Before what Body.	Vote.	
			Yes.	No.
1870	Resolve for constitutional amendment,	House.	68	133
1871	Resolve for constitutional amendment,	House.	68	68
1872	Resolve for constitutional amendment,	House.	78	135
	Petitions for municipal and county suffrage referred to committee, which reported a bill making valid acts of women holding office,	House.	70	100
1873	Resolve for constitutional amendment,	House.	83	142
1874	Resolve for constitutional amendment,	Senate.	14	19
1875	Bill for municipal suffrage,	Senate.	10	27
	Resolve for constitutional amendment,	House.	75	120
1876	Resolve for constitutional amendment,	House.	22	15
	Same,	House.	77	127
	Bill for municipal suffrage,	Senate.	11	19
1877	Resolve for constitutional amendment,	Senate.	18	13
	Same. Rejected,	House.	–	–[1]
	Bill for municipal suffrage,	House.	83	122
1878	Resolve for constitutional amendment,	Senate.	16	19
	Bill for municipal suffrage,	House.	92	128
1879	Resolve for constitutional amendment,	House.	82	85
	Bill for municipal suffrage. Refused third reading,	House.	–	–[1]
	Bill for school suffrage. Passed,	House.	–[2]	–
1880	Bill for suffrage on liquor licenses,	House.	79	113
1881	Bill for municipal suffrage,	House.	76	122
	Bill for further legislation on subject of school suffrage. Passed,	House.	–[2]	–
1882	Bill for municipal suffrage,	Senate.	12	21
	Bill for presidential suffrage,	House.	66	107
1883	Resolve urging Congress to pass a woman suffrage amendment to the United States Constitution,	Senate.	11	21
	Bill for municipal suffrage,	House.	60	127
1884	Petitions for presidential, municipal and license suffrage unfavorably reported by committee,	–	–	–
1885	Bill for municipal suffrage,	House.	61	130
1886	Bill for suffrage on liquor licenses,	Senate.	5	16
	Bill for municipal suffrage,	House.	59	114
1887	Bill for suffrage on liquor licenses,	House.	60	45
	Same,	Senate.	12	23
	Bill for municipal suffrage,	House.	61	97

[1] Rejected, but vote is not given in the Journal.

[2] Passed, but vote is not given in the Journal.

Woman Suffrage Measures in Massachusetts — Continued.

Date.	Nature of Measure.	Before what Body.	Vote.	
			Yes.	No.
1888	Bill for municipal suffrage,	House.	36	107
1889	Bill for suffrage on liquor licenses,	Senate.	16	12
	Same. Rejected by reference to next General Court,	House.	101	42
	Bill for municipal suffrage,	House.	78	127
1890	Bill for municipal suffrage,	House.	49	117
1891	Bill for municipal suffrage,	Senate.	9	22
1892	Bill for municipal suffrage,	Senate.	10	22
	Bill for suffrage on liquor licenses,	House.	87	90
1893	Bill for municipal suffrage,	House.	87	98
1894	Bill for municipal suffrage,	House.	109	93
	Same,	Senate.	13	23
1895	Bill authorizing persons qualified to vote for members of school committees to vote at next State election on question of municipal suffrage for women,	Senate.	—[1]	—
	Same,	House.	96	63
	Bill for municipal suffrage,	House.	87	127
1896	Bill for suffrage on liquor licenses,	House.	81	104
	Bill for municipal suffrage. Third reading refused,	House.	—	—
1897	Resolve for constitutional amendment,	House.	53	86
	Bill for suffrage on liquor licenses,	House.	81	98
1898	Report, leave to withdraw, on petition for municipal suffrage and suffrage on liquor licenses. Motion to substitute a bill for suffrage on liquor license lost by vote of 18 to 74,	House.	—	—
1899	Petitions for municipal and presidential suffrage reported unfavorably,	House.	—	—
1900	Petitions for municipal and presidential suffrage reported unfavorably,	House.	—	—
	Report, leave to withdraw, on petition for municipal suffrage. Motion to substitute bill lost by vote of 32 to 124,	House.	—	—
1901	Report, leave to withdraw, on petition for a constitutional amendment. Motion to substitute resolve for report lost by vote of 29 to 132,	House.	—	—
1902	Petitions for constitutional amendment and suffrage on liquor licenses reported unfavorably,	House.	—	—
1903	Petition for municipal suffrage reported unfavorably,	House.	—	—

[1] Passed, but vote is not given in the Journal.

Woman Suffrage Measures in Massachusetts — Continued.

Date.	Nature of Measure.	Before what Body.	Vote.	
			Yes.	No.
1904	Report, leave to withdraw, on petition for right of women to vote at primaries for candidates for school committee. Motion to substitute bill lost by vote of 36 to 61,	House.	–	–
1905	Bill to authorize women to participate in caucuses for nomination of school committees, ...	Senate.	5	17
1906	Petitions for constitutional amendment, municipal and license suffrage, and right to participate in caucuses for nomination of school committees reported unfavorably, . .	–	–	–
1907	Petition for suffrage on liquor licenses reported unfavorably, ...	–	–	–
1908	Petitions for municipal suffrage reported unfavorably, ...	–	–	–
1909	Report, leave to withdraw, on petition for constitutional amendment. Motion to substitute a resolve lost by a vote of 43 to 160, ...	House.	–	–
1910	Report, leave to withdraw, on petition for constitutional amendment. Motion to substitute a resolve lost by a vote of 47 to 148, ...	House.	–	–
1911	Report, leave to withdraw, on petition for constitutional amendment. Motion to substitute a resolve lost by a vote of 6 to 31, .	Senate.	–	–
	Report, leave to withdraw, on petition for constitutional amendment. Motion to substitute a resolve lost by a vote of 69 to 161, ...	House.	–	–
1912	Report, leave to withdraw, on petition for constitutional amendment. Motion to substitute a resolve lost by a vote of 14 to 17, ...	Senate.	–	–
	Report, leave to withdraw, on petition for constitutional amendment. Motion to substitute a resolve lost by a vote of 86 to 106, ...	House.	–	–
1913	Report, leave to withdraw, on petition for legislation to provide for expression of public opinion on woman suffrage. Motion to substitute a bill (H. 2339) lost by a vote of 53 to 139. Motion to substitute bill (H. 542) lost by a vote of 73 to 117, . .	House.	–	–
	Resolve for constitutional amendment, .	House.	144	88
1914	Resolve for constitutional amendment, .	Senate.	34	2
	Same, ...	House.	168	39
	Bill relative to granting women right to vote for candidates for school committees at primaries. Passed both Houses.	House. Senate.	–[1] –[1]	– –

[1] Passed, but vote is not given in the Journal.

Woman Suffrage Measures in Massachusetts — Concluded.

Date.	Nature of Measure.	Before what Body.	Vote.	
			Yes.	No.
1915	Resolve for constitutional amendment, .	Senate.	33	3
	Same (in House). Rejected by the people by a vote of 162,492 to 295,939, . . .	House.	196	33
	Resolve authorizing women to serve on political committees formed to favor or oppose suffrage amendment. Passed both Houses.	Senate.	–[1]	–
		House.	–[1]	–
1917	Report, leave to withdraw, on petition for definition of word "people" as used in section 6 of chapter 98 of General Acts of 1916, .	House.	–	–

[1] Passed, but vote is not given in the Journal.

Appendix D.

CONSTITUTIONAL PROVISIONS RELATING TO WOMAN SUFFRAGE.

Arizona (1912), Art. VII, Sec. 2. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election. The word "citizen" shall include persons of the male and female sex.

California (1911), Art. II, Sec. 1. Every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been resident of the State one year next preceding the election, and of the county in which he or she claims his or her vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law.

Colorado (1902), Art. VII, Sec. 1. Every person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections: He or she shall be a citizen of the United States, and shall have resided in the state twelve months immediately preceding the election at which he offers to vote, and in the county, city, town, ward or precinct, such time as may be prescribed by law.

Idaho (1896), Art. VI, Sec. 2. Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this State or Territory for six months, and in the county, where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; and until otherwise provided by the Legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho Territory.

Kansas (1913) Art. V, Sec. 8. The rights of citizens of the state of Kansas to vote and hold office shall not be denied or abridged on account of sex.

Louisiana (1898), Art. 199. Upon all questions submitted to the taxpayers, as such, of any municipal or other political subdivision of this State, the qualifications of all such taxpayers, as voters, shall

be those of age and residence prescribed by this Constitution, and women taxpayers shall have the right to vote at all such elections, without registration, in person or by their agents, authorized in writing; but all other persons voting at such elections shall be registered voters.

MICHIGAN (1918) Art. III, Sec. 1. In all elections every inhabitant of this State being a citizen of the United States; every inhabitant residing in this State on the twenty-fourth day of June, eighteen hundred thirty-five; every inhabitant residing in this State on the first day of January, eighteen hundred fifty; every male inhabitant of foreign birth who, having resided in the State two years and six months prior to the eighth day of November, eighteen hundred ninety-four, and having declared his intention to become a citizen of the United States two years and six months prior to said last named day; the wife of any inhabitant of foreign birth who, having resided in the State two years and six months prior to the eighth day of November, eighteen hundred ninety-four, and having declared his intention to become a citizen of the United States two years and six months prior to said last named day, and every civilized inhabitant of Indian descent, a native of the United States, shall be an elector and entitled to vote; but no one shall be an elector and entitled to vote at any election, unless he or she shall be above the age of twenty-one years and has resided in this State six months, and in the township or ward in which he or she offers to vote twenty days next preceding such election: Provided, That no qualified elector in the actual military service of the United States or of this State or in the army or navy thereof, or any student while in attendance at any institution of learning, or any regularly enrolled member of any citizens' military or naval training camp, held under the authority of the government of the United States or the State of Michigan, or any member of the Legislature while in attendance at any session of the Legislature, or commercial traveler, or any qualified elector employed upon or in the operation of railroad trains in this State, or any sailor engaged and employed on the great lakes or in coastwise trade, shall be deprived of a vote by reason of absence from the township, ward or State in which he or she resides; and the Legislature shall provide by law the manner in which and the time and place at which such absent electors may vote and for the canvass and return of their votes: Provided, further, That the Legislature shall have power to pass laws covering qualified electors who may be necessarily absent from other causes than above specified: And provided further, That there shall be no denial of the elective franchise at any election on account of sex.

MINNESOTA (1898), Art. VII, Sec. 8. Women may vote for school officers and members of library boards, and shall be eligible to hold any office pertaining to the management of schools or libraries.

Any woman of the age of twenty-one (21) years and upward and possessing the qualifications requisite to a male voter may vote at any election held for the purpose of choosing any officer of schools or any members of library boards, or upon any measure relating to schools or libraries, and shall be eligible to hold any office pertaining to the management of schools or libraries.

This amendment of 1898 supplants the amendment of 1875 by which school suffrage was granted.

Montana (1914), Art. IX, Sec. 2. Every person of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all general elections and for all officers that now are, or hereafter may be, elective by the people and upon all questions which may be submitted to the vote of the people: First, he shall be a citizen of the United States; second, he shall have resided in this state one year immediately preceding the election at which he offers to vote, and in the town, county or precinct such time as may be prescribed by law; Provided, first, that no person convicted of felony shall have the right to vote unless he has been pardoned; Provided, second, that nothing herein contained shall be construed to deprive any person of the right to vote who has such right at the time of the adoption of this constitution; Provided, that after the expiration of five years from the time of the adoption of this constitution no person except citizens of the United States shall have the right to vote.

Nevada (1914), Art. II, Sec. 1. All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; provided, that no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and no idiot or insane person shall be entitled to the privilege of an elector. There shall be no denial of the elective franchise at any election on account of sex.

New York (1917), Art. II, Sec. 1. Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be sub-

mitted to the vote of the people, provided, however, that a citizen by marriage shall have been an inhabitant of the United States for five years.

North Dakota (1889), Art. V, Sec. 128. Any woman having the qualifications enumerated in section 121 of this article as to age, residence and citizenship, and including those now qualified by the laws of the Territory, may vote for all school officers, and upon all questions pertaining solely to school matters, and be eligible to any school office.

Oklahoma (1918), Art. III, Sec. 1. Qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent (native of the United States) who are over the age of twenty-one years and who have resided in the State one year, in the County six months, and in the election precinct thirty days next preceding the election at which such elector offers to vote; Provided, that no person adjudged guilty of a felony, subject to such exceptions as the legislature may prescribe, nor any person kept in a poor-house at public expense, except Federal, Confederate, and Spanish-American ex-soldiers or sailors, nor any person in a public prison nor any idiot or lunatic, shall be entitled to register and vote.

Oregon (1912), Art. II, Sec 2. In all elections not otherwise provided for by this Constitution, every citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the State during the six months immediately preceding such election, shall be entitled to vote.

South Dakota (1918), Art. VII, Sec. 1. Every person resident of this State who shall be of the age of twenty-one years and upwards, not otherwise disqualified, belonging to either of the following classes, who shall have resided in the United States one year, in this State six months, in the county thirty days, and in the election precinct where such person offers his vote ten days next preceding any election, shall be a qualified elector at such election.

First. Citizens of the United States.

Second. Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States upon the subject of naturalization.

Utah (1896), Art. IV, Sec. 1. The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Washington (1910), Art. VI, Sec. 1. All persons of the age of twenty-one years or over possessing the following qualifications, shall be enittled to a vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct

thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language; . . . There shall be no denial of the elective franchise at any election on account of sex.

Wyoming (1890), Art. VI, Sec. 1. The rights of citizens of the state of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.

Appendix E.

PARTIAL SUFFRAGE STATUTES.

Arkansas.

An Act to provide that women may vote in all primary elections in Arkansas, prescribing qualifications.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. From and after the passage of this Act, and subject to all the provisions of the laws of this State as to age, residence, citizenship, payment of poll taxes, and otherwise regulating the manner and form of holding same; but specially exempt from every disqualification, direct or indirect, on account of sex, every woman in this State shall have the right to vote at any primary elections held under the laws of this State. *Provided*, that no woman shall be allowed to vote in any primary election unless, when requested by the judges she will make oath that she is of the same political faith, of the party holding said primary election, and that she will give her moral support to all nominees of said political party.

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 6, 1917. — *Public and Private Acts . . . of the Forty-first General Assembly of the State of Arkansas, 1917*, I, 1017.

Illinois.

An Act granting women the right to vote for presidential electors and certain other officers, and to participate and vote in certain matters and elections.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all women, citizens of the United States, above the age of 21 years, having resided in the State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, shall be allowed to vote at such election for presidential electors, member of the State Board of Equalization, clerk of the appellate court, county collector, county surveyor, members of board of assessors, members of board of review, sanitary district trustees, and for all officers of cities, villages and towns (except police magistrates), and upon all questions or propositions submitted to a vote of the electors of such municipalities or other political divisions of this State.

Section 2. All such women may also vote for the following township officers: supervisor, town clerk, assessor, collector and highway commissioner, and may also participate and vote in all annual and special town meetings in the township in which such election district shall be.

Section 3. Separate ballot boxes and ballots shall be provided for women which ballots shall contain the names of the candidates for such officers which are to be voted for and the special questions submitted as aforesaid, and the ballots cast by women shall be canvassed with the other ballots cast for such officers and on such questions. At any such election where registration is required, women shall register in the same manner as male voters.

Approved June 26, 1913. — *Laws of the State of Illinois, 1913*, 333.

Nebraska.

An Act relating to elections: to amend section 1940, revised statutes of 1913, relating to qualifications of voters, and to repeal said original section; and to provide for separate ballots and ballot boxes for female voters.

Be it Enacted by the People of the State of Nebraska:

Section 1. *Repeal.* — That Section 1940, Revised Statutes of 1913, is hereby amended to read as follows:

1940. Sec. 2. *Elections — qualification of electors — woman suffrage.* — Every person of the age of twenty-one years or upwards shall be an elector, and shall have the right to vote for all officers to be elected to public office, and upon all questions and propositions submitted to the voters, at any and all elections, authorized or provided for by the constitution or laws of Nebraska: Provided, however, that no female person shall be permitted to vote for United States Senator, United States Representative, or for any officers specified and designated in the constitution of Nebraska, or upon any question or proposition submitted to the voters, the manner of the submission of which is specified and designated in the constitution of Nebraska.

No person shall be qualified to vote at any election unless such person shall have resided in the state six months, in the county forty days and in the precinct, township, or ward ten days, and shall be a citizen of the United States, or shall be a person of foreign birth who shall have declared his or her intention to become a citizen, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to such election.

Sec. 2. *Repeal.* — That separate ballots and ballot boxes shall be provided for female electors. Such ballots shall contain the names of the candidates, and the questions and propositions submitted as female electors may vote for and upon. The ballots cast by female electors shall be counted and canvassed with and in the same manner as the ballots of male electors.

Sec. 3. That said original Section 1940, Revised Statutes of 1913, is hereby repealed.

Approved, April 21, 1917. — *Laws, Resolutions and Memorials Passed by the Legislature of the State of Nebraska, 1917*, 95.

North Dakota.

An Act granting the right to vote for presidential electors and certain other officers, and to participate and vote on certain matters and in certain elections.

Section 1. All women, citizens of the United States of the age of twenty-one years or upwards, who shall have resided in the State one year and in the County six months, and in the precinct ninety days next preceding any election, shall be allowed to vote at such election for Presidential Electors, County Surveyors, County Constables, and for all officers of cities, villages and towns (except Police Magistrates and City Justices of the Peace) and upon all questions or propositions submitted to a vote of the electors of such municipalities or other political divisions of the state.

Section 2 All such women may also vote for the following township officers: Township Clerk, Assessor, Treasurer, Overseer of Highways and Constables, and may also participate and vote in all annual and special Township meetings in the Township in which such election shall be.

Section 3. Separate ballot boxes and ballots shall be provided for women, which ballots shall, to the extent to which such women may vote, as aforesaid, be the same as those provided for male voters, both as to candidates and special questions submitted. At any such election where registration is required women shall register in the same manner as male voters.

Approved January 23, 1917. — *Laws passed at the Fifteenth Session of the Legislative Assembly of North Dakota, 1917*, 405.

Rhode Island.

An Act in amendment of and in addition to chapter 17 of the general laws, entitled "of the election of electors of president and vice-president of the united states."

It is enacted by the General Assembly as follows:

Section 1. Section 1 of Chapter 17 of the General Laws, entitled "Of the election of electors of president and vice-president of the United States," is hereby amended so as to read as follows:

Section 1. The people of this state qualified by law to vote for general officers, also every woman citizen of the United States, of the age of twenty-one years, who has had her residence and home in this state for two years, and in the town or city in which she may offer to vote six months, next preceding the time of her voting, and whose name shall be registered as hereinafter provided in the town or city where she resides on or before the last day of June next preceding the time of her voting, shall elect by ballot so many electors of president and vice-president of the United States as the state is or shall be entitled to, at town, ward and district meetings, on the Tuesday next after the first Monday in November, in every fourth year, commencing A. D. 1920, and the

several candidates having a plurality of the legal votes given in at such election shall be electors: Provided, however, that no woman citizen of foreign birth shall be entitled to vote unless she has resided in the United States five years.

Sec. 2. Said Chapter 17 of the General Laws is hereby amended by adding thereto the following sections:

Sec. 9. The registration of women citizens entitled to vote under this act, and the preparation, canvassing and correction of the voting lists thereof, shall be had in the same manner and at the same time and places, and under the same liabilities and penalties as is provided by law for the registration, and for the preparation, canvassing and correction of the lists of voters, qualified to vote for general officers: Provided, that every woman of foreign birth so registering, who shall claim citizenship through some other person, either by marriage or parentage, shall state at the time of her registration, when and where such other person was born, and if such other person was naturalized, when, where and by what court such other person was naturalized, and she shall file proof of such naturalization as may be necessary to establish her citizenship with the town clerk or the clerk of the board of registration, as the case may be, at least five days before any meeting of the board of canvassers of the town or city in which she claims the right to vote, and such proof shall be subject to the approval of such board of canvassers; and provided, further, that in preparing the lists of voters entitled to vote at any election of electors of president and vice-president of the United States, the names of all women citizens entitled to vote thereat shall be arranged on said lists separate and apart from the names of the other voters entitled to vote at such election under a heading "List of women voters entitled to vote for electors of president and vice-president of the United States."

Sec. 10. There shall be provided for the use of women citizens entitled to vote under this act a special ballot which shall be printed on paper of a color that will readily distinguish it from the ballots provided by the secretary of state for the use of voters entitled to vote for general officers. Such special ballot shall contain only the names of the several candidates for electors of president and vice-president of the United States and shall be endorsed in plain black type "Special ballot for electors of president and vice-president only," but in all other respects said special ballot shall be similar in form and arrangement and the instruction and information printed thereon, to the ballots required to be provided by the secretary of state under the provisions of Chapter 11 of the General Laws. Except as herein otherwise provided, the laws relating to the preparation, furnishing and delivery of the ballots required to be provided by the secretary of state for the use of voters qualified to vote for general officers, shall also apply to the preparation and furnishing of the special ballot herein provided for, and their delivery to the election officers of the several town and district meetings.

Sec. 11. Except as herein otherwise provided, the provisions of Chapter 20 of the General Laws, entitled " General provisions concerning

elections," and the provisions of all other laws relating to the conduct of elective meetings, and to the time and place of voting and to the manner and methods of marking, depositing and counting the ballots provided by the secretary of state for the use of voters entitled to vote for general officers, shall also apply to the time and place of voting, and to the manner of marking, depositing and counting the special ballots herein provided for the use of women citizens, and to the exercise or the attempt to exercise by women citizens of the elective franchise conferred by this act.

Sec. 12. Any moderator, warden, clerk or supervisor who shall furnish a woman claiming the right to vote under the provisions of this act with any ballot other than the ballot herein prescribed for her use, or shall permit her to deposit in the ballot box at any elective meeting at which she may claim the right to vote, any ballot other than the special ballot herein prescribed for her use, shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or be imprisoned for not more than three months, or by both such fine and imprisonment.

Acts and Resolves passed by the General Assembly of the State of Rhode Island and Providence Plantations, 1917, 98.

Texas.

An Act to provide that women may vote in all primary elections and nominating conventions in Texas; prescribing qualifications for such voters; providing for registration in cities of 10,000 or over; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. From and after the passage of this Act any woman, who possesses the other qualifications of an elector under the Constitution and laws of this State, shall have the right to vote at any and all primary elections or nominating conventions held under the laws of this State, and the fact of her sex shall in no wise disqualify such person, provided the payment of a poll tax shall in no case be required of such person as a qualification to vote in such primary elections or to participate in such nominating convention during the year 1918.

[Sections 2–4 provide for the registration of women voters.]

Sec. 5. The provisions of this Act shall apply to and govern the voting of women in the primary elections held during the year 1918, and from and after the first of January, 1919, each woman voter in this State, voting and offering to vote in any primary election or convention shall be required to pay the poll tax now required by law of each male person who desires to vote and shall be governed and controlled by all of the laws of the State of Texas, requiring and permitting the voting upon the payment of poll taxes in this State. . . .

Approved March 26, 1918. — *General and Special Laws of the State of Texas passed at the Fourth Called Session of the Thirty-fifth Legislature, 1918*, 61.

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BULLETIN No. 34

SPECIAL LEGISLATION

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SPECIAL LEGISLATION.

I. Definition of Terms.

There has been a good deal of criticism in recent years of the evils of special legislation, but the critics have found much difficulty in defining with precision the practices which they denounce. Blackstone, whose skill in exposition has seldom been excelled, divided all legislative acts into general or public acts and special or private acts. The former he described as "a universal rule that regards the whole country," and went on to say that "special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." English usage, however, has not followed the distinction here indicated. The terms general and special have been almost entirely discarded, and bills are now usually described as public or private. This has not removed all difficulty however. Sir Thomas Erskine May described a private bill as one that is for the particular interest or benefit of some person or persons, thus excluding from that category all those bills which applied only to a limited number of persons but did not operate to their benefit. Sir Courtney Ilbert met this difficulty by disregarding the question of benefit and taking the object of the bill as the criterion of its character. "The object of a private bill," he said, "is, not to alter the general law of the country, but to alter the law relating to some particular locality, or to confer rights on or relieve from liability some particular person or persons."[1]

The defect in all these definitions lies in the assumption that a bill which affects but a few persons is of no concern to any one else, whereas in fact such a bill may establish an important public policy. The inappropriateness of the term is even more manifest when a bill which affects only a particular locality is

[1] Ilbert, *Parliament: Its History, Constitution and Practice*, 85.

described as a private bill, for surely there can be nothing private about the affairs of a city, county or school district.

In the United States the English terminology has been adopted by Congress, which by statute has said that "the term 'private bill' shall be construed to mean all bills for the relief of private parties, bills granting pensions, bills removing political disabilities, and bills for the survey of rivers and harbors."[1] The application of this rule, however, has not been so simple as it might appear. In the practice of Congress only those bills are treated as private bills which appear on their face to be for the interest or benefit of a particular person or persons. In the decisions of the courts there is a tendency to use a more elastic standard and to designate as private or special those acts which apply to less than all the members of a particular class. The New York Constitution of 1894 adopted this test when it said as to the legislation for the three classes in which all the cities of the State were grouped:

> Laws relating to the property, affairs of government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section.

The definition of the term private or special legislation is a matter of great practical importance, for if the enactment of such legislation is to be subject to constitutional restriction it is essential that the meaning of the term should be clear.

II. The Nature of the Problem.

Special legislation has long been recognized as the chief source of many of the evils with which legislative bodies are afflicted and as one of the causes of their inefficiency. One of its conspicuous effects is that it has caused the legislator to think of the advancement of the local interests of his constituents as the chief object of his concern. This led Lord Bryce to say that "his first and main duty is to get the most he can for his constituency out of the State treasury, or by means of

[1] *U. S. Compiled Statutes*, sec. 7025.

State legislation. No appeal to the general interests would have weight with him against the interests of that spot." Elihu Root was even more severe when he said at the close of the New York Constitutional Convention of 1915 that "the Legislature of the State had declined in public esteem" and that the majority of the members "were occupying themselves chiefly in the promotion of private and local bills . . . which made them cowards and demoralized the whole body."

The volume of special legislation is so great that it vastly increases the expense of a legislative session. As far back as 1874 Governor Washburn of Massachusetts said: "Much and just complaint is made at the length of our legislative sessions. If we could have more general and less special legislation, . . . it seems to me there would be a fair prospect of bringing your labors to a close within a reasonable time." Some conception of the burden which special legislation imposes upon the law-making body may be obtained from the relative number of pages occupied by general and special laws in the statute books of those States in which the two are printed separately.

State.	Year.	General Acts (Pages).	Special Acts (Pages).
Connecticut,	1915	322	696
Connecticut,	1917	392	510
Florida,	1917	347	1,130
Massachusetts,	1915	392	465
Massachusetts,	1916	337	545
Massachusetts,	1917	514	502
North Carolina,	1915	457	2,277
Tennessee,	1913	629	1,621
Tennessee,	1915	668	2,230
Tennessee,	1917	598	2,582
Texas,	1917	504	622

A competent observer who long served in the Massachusetts Legislature has said:

I know that were all special legislation taken out of the Massachusetts General Court, eight or ten committees, some of them overburdened, could be wholly dispensed with, and others greatly relieved. Possibly the session could be cut in two, certainly it could be shortened by six weeks or two months, for on the average it lasts during nearly half the year.

Special legislation by its very bulk vastly increases the uncertainties of the law by making it more difficult for each individual to ascertain his rights. It seriously interferes in many instances with the policies of administrative boards and commissions. This is well illustrated by what was said by the Massachusetts Joint Special Committee on Legislative Procedure in 1915. It referred to ten special acts of the previous year which affected the system of State highways, and said:

> These were placed on our statute books without careful consideration as to the desirability or merits, and recommended by a committee less fitted to pass judgment than the commission created for the purpose and handling such questions continually. They are often contradictory to, interfere with, and generally upset, some part of the general systematic plan of the commission relative thereto, as, for example, the building of certain through trunk lines between our sister States in the first instance, and, next in order, the building of secondary trunk lines and certain connecting links between thickly settled places on the main thoroughfares. Remembering this general scheme, and taking into consideration the welfare of the whole State, simply shows the absurdity of some of these special acts. For example, chapters 78, 502, 733 and 779 of the Acts of the year 1914 are secondary routes which would doubtless have been constructed by the commission at some time, but which should wait for the completion of at least one through route first. It would seem as though, with an expenditure of over $2,000,000, that the State Legislature might be spared the necessity of considering nearly forty separate propositions and imposing an additional hundred thousand dollars upon the State tax by the adoption of ten or a dozen of them.[1]

The most demoralizing result of special legislation is that depicted by Grover Cleveland in 1891. Little can be added to his weighty words.

> The importance of a successful championship of these private bills, measured by a standard which ought not for a moment to be recognized, seems so vital to those having them in charge that they are easily led to barter their votes for measures as bad as theirs or worse, in order to secure the support of similarly situated colleagues. Thus is inaugurated a system called log-rolling, which comes frightfully near actual legislative corruption; and thus the people at large lose not only the attention to their affairs which is due to them, but are often no better than robbed of the money in the public treasury.[2]

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[1] *House Document No. 280* (1915).

[2] Parker, Ed., *Writings and Speeches of Grover Cleveland*, 175.

Against the undoubted evils of special legislation must be set off one powerful consideration in its favor. Great legislative policies can seldom be conceived and put into operation without a considerable period of experiment. It is only after many efforts attended by many failures that the well-matured and successful plan, which is a sort of generalization of all that has gone before, is finally evolved. Legislation is more often the product of imperative conditions than most law-makers realize, and they will best serve the public interest by responding to local demands as rapidly as they make themselves felt. To this end special legislation is necessary.

III. Private Bill Legislation in England.

The enactment of a private bill in the British Parliament partakes of the nature of a judicial proceeding. It is assumed throughout that the bill is being sought for the promotion of some private advantage and it is therefore incumbent on the petitioner to show that the advantage can be accorded him without detriment to the public, and without undue harm to any opposing private interest. In order that all concerned may have due notice, the bill must be deposited about two months before the opening of Parliament. Here it is considered first by the Lord Chairman and by the Chairman of Committees of the House of Commons, who are assisted by legal advisers. Any changes upon which they insist must be made, and it is then placed in the order of business of the Lords or the Commons as convenience may dictate. It is usually unopposed on its first and second reading and is referred to a select committee which is virtually a trial court. The members of this committee must have no interest in the bill. Its promotors appear as suitors while those who apprehend injury may appear in opposition. Both parties may be represented by counsel and witnesses may be examined. The preamble to the bill states the reasons for having recourse to legislation and the first business of the committee is to pass upon the sufficiency of these reasons. The bill is then examined and perhaps amended and the committee's conclusion is reported to the House. Here the bill takes its third reading, if favorably reported, and the committee's recommendation is seldom opposed.

An important feature of private bill legislation and one which increases the likeness of the proceedings to a suit at law is the expense involved. At every stage fees must be paid. The cost of putting the simplest unopposed private bill through Parliament is not much less than a thousand dollars, while if there is any opposition the fees will amount to at least five thousand dollars. In the contest between the cities of Manchester and Liverpool over the petition for the construction of the Manchester Ship Canal the legal expenses amounted to a million dollars.

In view of the obvious defects of the system, it is interesting to note that in the opinion of so competent a critic as President Lowell they are outweighed by its merits. He says:

> The curse of most representative bodies at the present day is the tendency of the members to urge the interests of their localities or their constituents. It is this more than anything else that has brought legislatures into discredit, and has made them appear to be concerned with a tangled skein of private interests rather than with the public welfare. It is this that makes possible the American boss, who draws his resources from his profession of private bill broker. Now the very essence of the English system lies in the fact that it tends to remove private and local bills from the general field of political discussion, and thus helps to rivet the attention of Parliament upon public matters. A ministry stands or falls upon its general legislative and administrative record, and not because it has offended one member by opposing the demands of a powerful company, and another by ignoring the desires of a borough council. Such a condition would not be possible unless Parliament was willing to leave private legislation in the main to small impartial committees, and abide by their judgment.[1]

IV. Special Legislation in Massachusetts.

A careful analysis and classification of the measures considered by the General Court of Massachusetts in 1916 has been made which affords a criterion of the extent of special legislation in this Commonwealth.[2] In that year 2,026 bills and resolves were referred to committees, of which 861 finally received the approval of both branches of the Legislature. In the accompanying table all the bills and resolves referred to

[1] Lowell, *The Government of England*, I, 391. See also Freund, *Standards of American Legislation*, 295.

[2] Wilder H. Haines, "Legislative Activity in Massachusetts," in *The American Political Science Review*, XI, 528 (August, 1917).

committees and all bills and resolves passed by both branches are classified in two groups. In the first group, marked "General," are included all bills of State-wide application. In the second group, marked "Special," are included all bills relating to specific agencies of the State, or to specific localities, or to specific individuals or corporations. In acting upon the measures included in group I, the General Court was legislating for the whole State, while in acting upon the measures in group II it was legislating for localities, individuals or corporations. If the number of bills in each group assigned to the various committees be examined, it will be noted that the measures in group II are centered in the hands of comparatively few committees. To those committees having to do with local government, namely, the Committees on Cities, Metropolitan Affairs, Municipal Finance, Towns, and Water Supply, were referred 346 measures, or ninety-three per cent of all the measures included in group II. Of the measures so referred, 192 were passed, being ninety-four per cent of all the measures in group II which became law. From this statement it appears that if some provision were made either for local home rule or for the devolution of legislative power over local questions to some other body, such as the Governor and Council, the General Court would have been relieved of the consideration of most of the special legislation which came before it in 1916.

An examination of the character of the bills referred to the five committees named above shows that many of them relate to mere administrative details. Fifty-six per cent of the bills referred to the Committee on Metropolitan Affairs were devoted to instructions to commissions or other officers as to the construction, improvement or control of specific streets, parks, rivers, harbors or public utilities. Many of the bills referred to other committees than those named are also concerned primarily with details of administration. Thus sixty-two per cent of all the bills referred to the Committee on Harbors and Public Lands related to specific instructions as to surveys and improvements of public lands and harbors, and forty per cent of the bills referred to the Committee on Roads and Bridges related to the construction or improvement of specific highways by the Highway Commission. Forty-seven per cent of the bills

Classification of Bills committed and Bills passed.

Committee.	Group I. — General.			Group II. — Special.			Group Total.		
	Committed.	Passed.	Vetoed.	Committed.	Passed.	Vetoed.	Committed.	Passed.	Vetoed.
1. Agriculture,	32	14	–	16	5	–	48	19	–
2. Agriculture and Public Health,	13	2	–	2	2	–	15	4	–
3. Banks and Banking,	14	5	–	4	1	–	18	6	–
4. Cities,	15	6	1	96	49	3	111	55	4
5. Constitutional Amendments,	23	1	–	–	–	–	23	1	–
6. Counties,	2	2	–	6	16	–	8	18	–
7. Education,	58	18	–	13	9	–	71	27	–
8. Election Laws,	41	7	–	10	2	–	51	9	–
9. Federal Relations,	19	–	–	–	–	–	19	–	–
10. Fisheries and Game,	49	13	1	17	7	–	66	20	1
11. Harbors and Public Lands,	16	2	–	36	20	–	52	22	–
12. Insurance,	33	14	–	4	2	–	37	16	–
13. Joint Judiciary,	189	30	2	9	4	–	198	34	2
14. Labor,	23	7	–	–	1	–	23	8	–
15. Legal Affairs,	114	22	1	20	14	–	134	36	1
16. Mercantile Affairs,	79	10	1	38	27	–	117	37	1
17. Metropolitan Affairs,	–	–	–	126	44	2	126	44	2
18. Military Affairs,	50	21	–	2	3	–	52	24	–
19. Municipal Finance,	10	5	–	69	54	3	79	59	3
20. Public Health,	79	16	–	8	6	–	87	22	–
21. Public Institutions,	52	24	1	28	17	–	80	41	1
22. Public Lighting,	14	3	–	7	2	–	21	5	–

23. Public Service,	79	13	–	68	30	–	147	43	–
24. Railroads,	7	2	–	11	6	–	18	8	–
25. Roads and Bridges,	44	8	–	39	23	–	83	31	–
26. Rules, Joint,	3	–	–	2	–	–	5	–	–
27. Social Welfare,	90	15	–	17	5	–	107	20	–
28. State House and Libraries,	13	8	–	3	1	–	16	9	–
29. Street Railways,	19	4	–	14	4	–	33	8	–
30. Taxation,	53	16	–	2	1	–	55	17	–
31. Towns,	3	2	–	40	32	1[1]	43	34	1[1]
32. Water supply,	–	–	–	15	13	–	15	13	–
33. Redistricting (special),	–	1	–	–	–	–	–	1	–
34. Governor's Message (special),	37	7	–	–	–	–	37	7	–
35. Ways and Means (House),	16	144[2]	–	3	2	–	19	146[2]	–
36. Ways and Means (Joint and Senate),	12	11	–	–	1	–	12	12	–
37. No committee,	–	–	–	–	3	–	–	3	–
38. Not accounted for,	–	–	–	–	–	–	–	2	–
Totals,	1,301	453	7	725	406	9[1]	2,026	861	16[1]

[1] One bill passed over veto.

[2] Includes 125 appropriation and revenue bills.

referred to the Committee on Public Institutions related to the establishment or improvement of institutions for the insane or for hospitals, while thirty-four per cent of the bills referred to the Committee on Public Service related to specific increases of salary. Another class of bills provided for the payment of claims or the granting of pensions. In 1916 eighty-three such bills were referred to committees, and forty-four were passed. Nearly half of these related to cities, counties or towns.

These figures are sufficient to indicate the great burden which special legislation imposes upon the General Court of Massachusetts. The effect upon the quality of the legislation enacted can only be detrimental, since the entire membership can seldom be induced to give attention to measures which have only a local interest, but which consume time and energy which should be devoted to the State as a whole. The problem which special legislation presents is well indicated in the following words:

> To confine the Legislature to hose matters of State-wide policy with which it alone is fitted and intended to occupy itself, — to eliminate from its work the elements which from their nature it can handle only unsuccessfully, which waste its time, while preventing proper consideration of its proper work, and which offer urgent temptations to petty political log-rolling and pork, — this is a most pressing need of State government to-day. The grosser forms of corruption have gone. The machinery of election and procedure is on the way to improvement. The question now is one of efficiency, rather than of popular responsibility, and for efficiency not only must the organization and procedure be businesslike, but the subject matter must be adapted to the body which is to deal with it. The State must redistribute its work. The question of subject matter is the more fundamental, for if the work of the Legislature is confined largely to matters of State-wide importance, on the one hand it will attract more popular interest and create a closer bond of responsibility between electorate and representatives, and on the other hand it will render more feasible the reforms of organization which are also necessary.[1]

V. Constitutional Restrictions on American Legislatures.

The framers of our first American constitutions were more concerned about the prevention of privileges than they were as to the evils of special legislation. The transition, however,

[1] Wilder H. Haines in *The American Political Science Review*, XI., 538.

from one to the other was easy to make because the exempting of an individual from the operation of a general rule or the enactment of a special law in his favor is in itself in the nature of a privilege. The close connection between the two things is apparent in the language adopted in the Constitution of Tennessee in 1834:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law.

As soon as the evils of special legislation began to appear, the States inserted in their constitutions provisions to the effect that the subjects to which the special acts related should hereafter be dealt with only by general laws. The first State to apply this remedy was Georgia, which as early as 1789 inserted in its Constitution the following provision:

> The Legislature shall have no power to change names, nor to Legitimate persons, nor to make or change Precincts, nor to establish Bridges or Ferries, but shall, by law, prescribe the manner in which said powers shall be exercised by the Superior or Inferior courts, and the privileges to be enjoyed.

In another part of the same instrument it was provided that divorces should not be granted by the Legislature until after a trial before the Superior Court and a verdict authorizing a divorce upon legal principles. In such cases an act of divorce might be passed by a two-thirds vote of each house.

To trace in detail the gradual expansion of the modest restrictions imposed by Georgia in 1789 would be unduly tedious. It is sufficient to say that State after State has inserted in its constitution a list of subjects as to which the Legislature is forbidden to enact special laws, and year by year these lists have increased in length. Their subject matter is usually suggested by the experience of the State concerned and hence there is considerable variance in their contents. One of

the most comprehensive of them is that embodied in the Constitution of Alabama in 1901. In that year Alabama provided that its Legislature should meet only once in four years. In substituting quadrennial for biennial sessions, the jurisdiction of the Legislature was considerably restricted, especially in the matter of local or special legislation. By this arrangement it was hoped that one quadrennial session devoted entirely to general legislation would be sufficient to meet the needs of the State. How extensive these restrictions are appears from the following constitutional provisions:

The Legislature shall not pass a special, private or local law in any of the following cases:

(1) Granting a divorce;

(2) Relieving any minor of the disabilities of non-age;

(3) Changing the name of any corporation, association, or individual;

(4) Providing for the adopting or legitimizing of any child;

(5) Incorporating a city, town or village;

(6) Granting a charter to any corporation, association, or individual;

(7) Establishing rules of descent or distribution;

(8) Regulating the time within which a civil or criminal action may be begun;

(9) Exempting any individual, private corporation or association from the operation of any general law;

(10) Providing for the sale of the property of any individual or estate;

(11) Changing or locating a county seat;

(12) Providing for a change of venue in any case;

(13) Regulating the rate of interest;

(14) Fixing the punishment of crime;

(15) Regulating either the assessment or collection of taxes, except in connection with the readjustment, renewal, or extension of existing municipal indebtedness created prior to the ratification of the Constitution of eighteen hundred and seventy-five;

(16) Giving effect to an invalid will, deed or other instrument;

(17) Authorizing any county, city, town, village, district or other political subdivision of a county, to issue bonds or other securities unless the issuance of said bonds or other securities shall have been authorized before the enactment of such local or special law, by a vote of the duly qualified electors of such county, township, city, town, village, district or other political subdivision of a county, at an election held for such purpose, in the manner that may be prescribed by law; provided, the Legislature may without such election, pass special laws to refund bonds issued before the date of the ratification of this Constitution;

(18) Amending, confirming or extending the charter of any private municipal corporation, or remitting the forfeiture thereof; provided, this

shall not prohibit the Legislature from altering or re-arranging the boundaries of any city, town or village;

(19) Creating, extending or impairing any lien;

(20) Chartering or licensing any ferry, road or bridge;

(21) Increasing the jurisdiction and fees of justices of the peace, or the fees of constables;

(22) Establishing separate school districts;

(23) Establishing separate stock districts;

(24) Creating, increasing or decreasing fees, percentages or allowances of public officers;

(25) Exempting property from taxation or from levy or sale;

(26) Exempting any person from jury, road or other civil duty;

(27) Donating any lands owned by or under control of the State to any person or corporation;

(28) Remitting fines, penalties or forfeitures;

(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts or districts, except in the event of the organization of new counties, or the changing of the lines of old counties;

(30) Restoring the right to vote to persons convicted of infamous crimes or crimes involving moral turpitude;

(31) Declaring who shall be liners between precincts or between counties.[1]

In contrast with this method of controlling special legislation by specific prohibitions is the general prohibition, found in about five-eighths of the States, to the effect that no special law shall be enacted where a general law can be made applicable. This provision has the unfortunate consequence that the enactment of any special law always invites litigation on the question as to whether or not a general law could have been made to apply.

In examining the lists of restrictions imposed upon the power of legislatures to enact special laws, certain subjects are almost always found. The growth of the corporate form of organization in industry made the granting of charters of incorporation a matter of increasing importance and the methods adopted for securing charter provisions satisfactory to the incorporators led to numerous scandals. As early as 1821 an effort was made in the Constitutional Convention of New York to provide that an act of incorporation should be granted only by a general law, but it was not until 1845 that a general prohibition of incor-

[1] *Constitution of Alabama (1901)*, sec. 104.

poration by special laws was adopted by any State. This was in Louisiana, which was followed in 1846 by New York. The Massachusetts Convention of 1853 submitted a harmless amendment which said "the legislature shall not create corporations by special act when the object of the incorporation is attainable by general laws." Incorporation by general law is now provided for by the constitutions of four-fifths of the States and in most of the others the same result is attained by statute.

Another restriction commonly found in the constitutions of the States is that which forbids grants of credit of public money in aid of private enterprises. These restrictions were the result of the disastrous experiences of the States in the reckless appropriation of public funds and the loaning of the public credit for the development of railways, canals, banks, and various other enterprises of a semi-public nature.

The salaries of public officials have been the occasion of a great deal of special legislation, and the tendency of legislators to be generous with popular public officials has proved expensive to the States concerned. As a result about two-thirds of the States now provide that salaries can be neither increased nor diminished during the term for which the officer was chosen. Closely akin to the matter of salaries is the granting of pensions, annuities, or sums for extra services. How great is the need for restriction upon measures of this kind appears from the fact that in Massachusetts in the five years prior to 1915, 392 petitions were presented for increased or special compensation.

VI. Results.

One effect of the numerous restrictions on legislative action now contained in the State constitutions is a great reduction in the volume of legislation. In Illinois the private laws adopted at a single session filled 3,354 pages. Then came a constitutional prohibition of special legislation as to twenty-three subjects, and in the ensuing five sessions, such legislation filled an average of only 228 pages. This may be taken as typical of the result in all the States. Whenever special legislation is restricted, the volume of legislation has been materially reduced.

It must also be admitted that the restrictions upon the

enactment of special legislation have resulted in removing from the legislators many of the temptations to which they had been previously exposed. The grant of a special charter containing corporate privileges that could not be obtained under general law, or the grant of a public franchise freed from some of the restrictions to which all such franchises as a class were subject might be so valuable to the parties interested as to make it profitable for them to expend large sums in order to obtain the legislative action desired. The demoralizing influence of such methods was not confined, however, to the action of the Legislature upon the measure in question, but necessarily resulted in lowering the moral tone of the entire body in every phase of its activity. While no constitutional restrictions can protect legislators from subjection to temptations of this kind, it is undoubtedly true that the safeguards against special legislation which have been so generally adopted greatly reduce the occasion for such temptations. If the moral tone of legislative bodies appears to be higher now than it was fifty years ago, the difference may be partly attributed to the fact that it is not now so easy for a legislator to go wrong.

It has already been intimated that the constitutional provision to the effect that no special law shall be enacted when a general law can be made to apply is an invitation to litigation. Many courts have been called upon to determine whether or not the occasion existed for the enactment of a special law. In State *v.* Boone County Court (1872) 50 Missouri, 317, the court declined to answer this question, and took the ground that the prohibition in the Constitution was merely a rule of action for the guidance of the Legislature and that the Legislature is itself the sole judge of the necessity for special legislation. This decision of the Missouri court, which was followed by the courts of some other States, produced so much dissatisfaction that in 1875 an amendment was added to the Constitution of Missouri declaring that whether or not a general law could be made to apply was a judicial question. A similar declaration is found in the Constitutions of Minnesota, Alabama, Kansas, and Michigan. In many States, however, the courts arrived at this result without any such express provision in the Constitution. In such instances they have not hesitated

to examine the facts and to determine independently whether or not a general law could be made to apply. This question has arisen with particular frequency in the interpretation of legislative acts providing for the classification of cities. Under the form of grouping all the cities of a particular kind in one class and applying a general law to the whole class, some legislatures have tried to enact a special law which would apply to only one city. Sometimes this has led to absurd results. Should the Legislature of Massachusetts enact a law applying to all cities having more than 500,000 inhabitants, it would affect only the city of Boston, but such a law would be upheld as reasonable classification in any State in the Union. On the other hand, when the State of Pennsylvania enacted a law applying to all cities of eight thousand inhabitants situated at a distance of more than twenty-seven miles by the usually travelled road from the county line in a county of more than sixty thousand inhabitants, the court held that this was classification run mad, and declared that the act in question was special legislation contrary to the Constitution.[1]

VII. Remedies.

Great as have been the evils which have accompanied special legislation, it must be recognized that it is a mode of action which is often indispensable, and that there is nothing inherently evil in its nature. Hence it is for statesmen and lawmakers to devise some way of lessening its injuries while preserving its benefits. Several such methods have been suggested.

The English system of provisional orders is probably the simplest mode of providing for special legislation.[2] By conferring upon such bodies as the Local Government Board, the Board of Trade, and two or three others, the power to issue orders which shall have the force of law until set aside by Parliament, the supreme legislature has rid itself of much of the great burden of special legislation with its accompanying evils, while at the same time it reserves to itself complete and final authority. Some of the benefits of this system might be ob-

[1] Commowealth v. Patton (1878), 88 Pennsylvania, 258.

[2] See Bulletin No. 30, *The English System of Provisional Orders.*

tained without the adoption of the system as a whole. In fact, although it is not generally recognized, we already apply the principle of the system to much of our local government. The ordinances which our cities and towns are authorized to issue are in most States nothing more than provisional orders which can at any time be set aside by the State Legislature. The fact that the Legislature seldom exercises this power does not argue that it does not exist. It would require but little modification to make the ordinances issued by our local governments conform exactly to the English system of provisional orders.

One step which has been taken in many of the States as a means of reducing the evils of special legislation is the requirement that there shall be notice of application for such action. A large part of the unfortunate consequences which have come from special legislation can be attributed to the fact that it was carried through the two houses within a short space of time, and before the public could be informed of the nature of the measure which was pending. As early as 1805 Thomas Paine tried to persuade the people of Pennsylvania to place in their Constitution a requirement that no special legislation or private act should be adopted until the expiration of a certain period of notice, but it was not until thirty years later that North Carolina led the way by inserting such a provision in its Constitution. A similar requirement is now found in the constitutions of several States, while others have attempted to attain the same result by statute. It would seem, however, that there can be no assurance that the publication of notice will attract any attention to the pending measure. The number of legislative proposals is so great and the attention of men is so occupied with their immediate concerns that it is easy for a private bill of a most reprehensible character to escape public attention. Such a measure would be more likely to be exposed if it were first enacted by a subordinate legislative body, such as a board or commission, and were then submitted to the Legislature of the State for ratification and approval.

Many of the difficulties which attend special legislation would disappear if we accepted the distinction so commonly made in Europe between legislation and administration. In France, for

instance, there is the fullest recognition that legislation deals with the determination of policies, while administration is charged with providing the means for putting those policies into operation. It is for Parliament to enact statutes, but it is for the President or other executive officers to supply the details which make the statute an effective act of government. In America vast power has already been conferred upon executive officers to issue administrative orders, but the situation would be much improved if there were frank acceptance of the fact that the business of government has grown to a point where legislation should be sharply separated from administration, and the law-making body should no longer attempt to cover in its enactments every possible detail of every situation which can arise. Two of the most far-sighted of living statesmen, both of whom are not only students of politics but have had wide experience both as legislators and as executives, have expressed themselves upon this point. In 1908 Lord Bryce said:

> Every modern legislature has more work thrown on it than it can find time to handle properly. In order, therefore, to secure sufficient time for the consideration of measures of general and permanent applicability, such matters as those relating to the details of administration or in the nature of executive orders should be left to be dealt with by the administrative department of government, under delegated powers, possibly with a right to disapprove reserved to the legislature.

On the same point Elihu Root has expressed himself as follows:

> When a legislative body has more business to do than it can properly consider, there is only one avenue of relief, and that is a continual increase of delegation of power. What the legislature could readily have done fifty years ago, the legislature could not half do to-day, and it must delegate the other half to somebody else. That delegation of authority to subordinate officers or bodies that must exercise discretion formerly withheld from them, that must make rules and regulations upon matters formerly dealt with by statute, requires careful adjustment of governmental machinery, and we have not the machinery properly adjusted for the necessary process of government.

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BULLETIN No. 35

THE AMENDMENT AND REVISION OF STATE CONSTITUTIONS

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THE AMENDMENT AND REVISION OF STATE CONSTITUTIONS.

I. The First American Constitutions.

In the Constitutional Convention which met in Massachusetts in 1820 Daniel Webster said:

> With the experience which we had had of the constitution, there was little probability that after the amendments which should now be adopted, there would be any occasion for great changes. No revision of its general principles would be necessary. And the alterations which should be called for by a change of circumstances would be limited and specific.

In expressing these views Webster did not foresee the vast social and economic changes which have taken place since his time, nor could he foretell the change which has come about in the public mind as to the proper functions of government. In 1780 and in 1820, and indeed in 1853, the people of Massachusetts were largely interested in establishing a series of checks and balances which would prevent an abuse of official authority, while at the present day emphasis is placed upon providing organs which can act and can meet the burdens which public opinion now places upon government.

Constitutions, particularly those of the States, reflect the political tenets and the social and economic beliefs of the times in which they are framed. As these change, constitutional provisions must correspondingly change, and the more detailed the constitution the more imperative will such changes become. Hence the amendment and revision of constitutions, while occurring perhaps at long intervals, is a normal part of our political life and should be provided for in the fundamental law of each State.

The outbreak of the Revolution in 1775 was quickly followed by the overthrow of the governments established in the colonies by the King's authority. An appeal for advice having been made to the Continental Congress, that body, on May 10,

1776, recommended "to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general." [1] This resolution was quite generally acted upon, and before the close of 1780 all the colonies save Rhode Island and Connecticut, which retained their original charters, had adopted new constitutions.

The breach with Great Britain was followed by considerable confusion of thought as to the legal situation created thereby and by uncertainty as to the future. New Hampshire took the extreme view that by the severance of relations with Great Britain all government had been destroyed. "It is our humble opinion," said a meeting of New Hampshire towns, "that when the Declaration of Independency took place, the Colonies were absolutely in a state of nature, and the powers of Government reverted to the people at large." [2] New Jersey on the other hand, while declaring that because of the misrule of George III. "all civil authority under him is necessarily at an end, and a dissolution of government in each colony has consequently taken place," nevertheless held out this olive branch:

> Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great Britain and these Colonies should take place, and the latter be taken again under the protection and government of the crown of Britain, this Charter shall be null and void — otherwise to remain firm and inviolable.[3]

Whether or not the people had reverted to a state of nature and whether the breach with Great Britain was to be temporary or permanent, some provision had to be made for the erection or the continuance of institutions of government. By whom or by what organ of government should this be done? The obvious convenience of allowing the existing Provincial Congress or its successor to draft a new constitution impelled some States to adopt this mode. New Hampshire was one of these, but the opposition to the assumption of such authority

[1] *Journals of the Continental Congress* (Ford, ed.), IV, 342.
[2] Cited in Dodd, *The Revision and Amendment of State Constitutions*, 2.
[3] *Constitution of New Jersey* (1777), Art. XXIII.

was so great that it was necessary to send out a deputation to explain that the new government was only temporary. In Massachusetts the General Court requested the towns to empower it to frame a constitution. This request provoked much opposition, and the town of Concord, in what is believed to be the earliest formal statement in any official document of the distinction between a legislature and a constitutional convention, said:

> That the Supreme Legislative, either in their Proper Capacity, or in Joint Committee, are by no means a Body proper to form & Establish a Constitution, or form of Government; for Reasons following, first Because we Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession & enjoyment of their Rights and Privileges, against any Encroachments of the Governing Part — 2^{d} Because the Same Body that forms a Constitution have of Consequence a power to alter it. 3^{d} Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights & privileges.[1]

So many towns, however, finally complied with the request of the General Court that it proceeded to frame a constitution which it submitted to the people in 1778. It was rejected, largely because of the source from which it emanated. Two years later another constitution, framed by a convention specially chosen for that purpose, was ratified by the people, and still continues to be the fundamental law of the Commonwealth.

In brief it may be said that of the constitutions framed in the period between the meeting of the Second Continental Congress in 1775 and the assembling of the Federal Convention in 1787, those of South Carolina (1776), Virginia and New Jersey were framed and promulgated by legislative bodies acting without special authority; those of New Hampshire (1776), Delaware, Georgia, New York and Vermont were framed and promulgated by legislative bodies which had been authorized by the people; those of Maryland, Pennsylvania, North Carolina, South Carolina (1778) and Massachusetts

[1] The whole of this interesting document is printed in Appendix A. It is reproduced in facsimile as a frontispiece of *A Manual for the Constitutional Convention of Massachusetts, 1917.*

(1778) were framed by legislative bodies which formally or informally submitted their work to the people; those of Delaware and Georgia were framed and promulgated by a constitutional convention; those of Massachusetts (1780) and New Hampshire (1783) were framed by constitutional conventions chosen for that purpose only and were ratified by the people.

It was to be expected that constitutions drawn up in the midst of so much confusion and uncertainty as to the future should be crude and in many respects deficient. One of their most conspicuous defects was in the matter of amendment. Six of the fifteen constitutions adopted before 1787 did not mention the subject.[1] Among the nine instruments which provided in some form for their amendment, there was great variance. Some adopted indirect and cumbersome methods; others made the process so difficult as to be practically impossible, while one went so far in the opposite direction as to permit amendment in the ordinary form of statutory enactment. The Massachusetts Constitution of 1780 provided that the question of calling a constitutional convention should be submitted to the voters in 1795, but it contained no other provision for amendment. Few States, however, have since failed to perceive that changes in political and social and economic conditions will necessitate changes in the organic law. No State outside of the original thirteen has ever failed to provide for the amendment of its constitution, and every constitution now in force anywhere in the Union contains some sort of provision to that end.

II. The Proposal of Amendments.

In the forty-eight States of the Union it is now almost universally recognized that changes in the fundamental law shall be made only with the approval of the electorate. Delaware still permits its Legislature to make constitutional changes without reference to a popular vote and there are a few other States in which conventions, sometimes in direct violation of an

[1] These were the New Hampshire, New Jersey, North Carolina, South Carolina and Virginia Constitutions of 1776 and the New York Constitution of 1777. Since 1787 only the Pennsylvania Constitution of 1790 and the Virginia Constitutions of 1830, 1851 and 1864 have contained no provision for amendment.

express constitutional provision, have promulgated constitutions which they had formulated. These isolated instances, however, only make more impressive the rule, which is now all but universal, that constitutional changes derive their validity from popular ratification.

Before the voters can act upon changes in their instruments of government those changes must be formulated and submitted for their consideration. For this purpose three agencies have been employed.

1. *The Constitutional Convention.*

This is the most imposing organ of government which the States have devised. Called for the one purpose of considering changes in the existing constitution, the importance of its duties has in every State attracted to its membership many prominent citizens who would not be willing to consider service in the legislature, but who gladly accept the responsibilities which are involved in election to the convention. This was conspicuously illustrated in the New York Conventions of 1894 and 1915, which were presided over, respectively, by Joseph H. Choate and Elihu Root. The convention is the organ which is now always employed when a general revision of the constitution is undertaken, and it may also be employed when particular changes only are considered. The line between a general revision and specific amendments is an indefinite one. It would be correct to say, however, in the light of practice, that when changes are to be made which may not amount to a general revision, but which cannot be regarded as isolated, specific changes, the convention is employed.

2. *The Legislature.*

The obvious convenience of intrusting the formulation of isolated or specific amendments to a body already in existence has resulted in provision in every State except New Hampshire that such amendments may be formulated by the legislature. In every State except Delaware the action of the legislature must be submitted to the people for approval.

3. *The Popular Initiative Petition.*

As early as 1777, the Constitution of Georgia contained the following provision:

> No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.[1]

It is to be noted that under this crude form of popular initiative, no discretion is left either to the Legislature or to the Convention. The Constitution is to be amended "according to the petitions preferred to the assembly by the majority of the counties." The use thus made of the counties is unique. The crudeness of this arrangement for ascertaining public sentiment is evident from the fact that amendments made on the basis of the wishes of a majority of the voters in a majority of the counties might even then lack the approval of a majority of the voters of the State.

Georgia abandoned the popular initiative of constitutional amendments in 1789, and the principle lay dormant until it was put into effect in a much more highly developed form by the State of Oregon, which in 1902 adopted a provision whereby eight per cent of the voters may propose a constitutional amendment, which shall then be submitted to the entire electorate for approval or rejection. This method of proposing amendments has been adopted in fourteen States.[2]

Of the forty-eight State constitutions now in force in the Union, thirty-five contain provisions for the calling of a constitutional convention.[3] In all of these States except Georgia the resolution of the legislature providing for a convention must be submitted to the people for ratification, which in eighteen States may be accomplished by a majority of those

[1] *Constitution of Georgia* (1777), Art. LXIII.

[2] For a full consideration of this mode of proposing constitutional amendments see Bulletin No. 6, *The Initiative and Referendum.*

[3] The States which make no constitutional provision for a convention are Arkansas, Connecticut, Indiana, Louisiana, Maine, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas and Vermont.

voting on the question,[1] while in sixteen States a majority of all those voting at the election is required.[2] Forty-six provide that specific amendments may be submitted to the people by the legislature.[3] Fourteen provide that amendments may be originated by an initiative petition.[4] Eleven make express provision for all of these methods of originating amendments,[5] while thirty-four provide for submission by both a convention and by a legislature. Delaware is alone in authorizing its Legislature to amend the Constitution without submitting its proposals to the people, and New Hampshire provides for the submission of amendments only by a constitutional convention. In the thirteen States where no express provision is made for calling a convention, the legislature probably possesses the power to make such a provision except in Rhode Island and possibly in Indiana. In fact, conventions without express constitutional warrant have been held in Arkansas, Connecticut, Louisiana and Massachusetts, and their validity has not been seriously questioned. In Mississippi not only has such a convention been held, but the constitution which it framed was put in force without submission to the people, and this action was sustained by the Supreme Court of that State.[6]

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[1] A majority of those voting on the question is required in Arizona, Colorado, Delaware, Florida, Iowa, Kentucky, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Virginia, West Virginia and Wisconsin. Kentucky also stipulates that the majority in favor of calling a convention shall be "equal to one-fourth the number of qualified voters who voted at the last preceding general election."

[2] A majority of all electors voting at the election is required in Alabama, California, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, South Carolina, South Dakota, Utah, Washington and Wyoming.

[3] All except Delaware and New Hampshire.

[4] Amendments may be originated by an initiative petition in Arizona, Arkansas, California, Colorado, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and Utah.

[5] These are Arizona, California, Colorado, Michigan, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Oregon and Utah.

[6] Sproule *v.* Fredericks (1892), 69 Miss. 898. In the course of the oration which the court pronounced in rendering its decision occurs this eloquent passage:

"We have spoken of the constitutional convention as a *sovereign body*, and that characterization perfectly defines the correct view, in our opinion, of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it for the purpose and the occasion by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is, that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the frame-work, but the particular fashioning of the parts of this frame-work is confided to the wisdom, the faithfulness and the patriotism of this great convention representing the people in their sovereignty."

III. The Constitutional Convention.

1. *Provisions for Calling a Constitutional Convention.*

It is now generally recognized that a constitutional convention is the organ through which a general constitutional revision should be undertaken. That being the case, how is it to be determined when a convention shall be summoned? With reference to this question, the constitutions of the States may be divided into five classes.

1. Those which require the calling of a convention periodically or at a specified time.

Provisions of this kind are found only in a few of the earliest constitutions. The New Hampshire Constitution of 1784 required a convention to be summoned at the expiration of seven years. By the Georgia Constitution of 1789 a convention was to be called in 1794. Such provisions are no longer found in any constitution.

2. Those which require the people to vote at a specified time or periodically on the question of calling a convention.

Provisions of this kind are comparatively numerous. The Massachusetts Constitution of 1780 required such a vote in 1795 and made no further provision for a convention should this vote prove to be adverse, as, in fact, it did. The Kentucky Constitution of 1792 provided for a vote of the people in 1797 and 1798. Several constitutions require that a vote shall be taken not only at a certain date but at regular intervals thereafter. An example of this is the Ohio Constitution of 1851, which provides:

> At the general election to be held in the year one thousand eight hundred and seventy-one and in each twentieth year thereafter, the question "Shall there be a convention to revise, alter or amend the constitution" shall be submitted to the electors of this State; and in case a majority of all the electors voting at such election shall decide in favor of a convention, the general assembly, at its next session, shall provide by law for the election of delegates, and the assembling of such convention as is provided for in the preceding section.[1]

The length of the interval at the end of which the popular vote is taken varies, but the usual period is twenty years.

[1] *Constitution of Ohio* (1851), Art. XVI, sec. 3.

Provisions are found, however, for taking such a vote every seventh, tenth, twelfth and sixteenth years. Provisions requiring a vote at a definite time are believed by some persons to lend stability to a constitution. The certainty of a decision at a fixed time and independent of the sentiment prevailing in the legislature as to a general revision of the constitution is thought to have a tendency to induce people to bear with its faults and to discourage agitation for constant change.[1]

3. Those which authorize the legislature to submit to the people whenever it deems it expedient the question of calling a convention.

This provision is found in the constitutions of more than half the States. As this question is regarded as standing somewhat apart from the usual activity of the legislature, action thereon is surrounded by some restrictions. In most of the States in which the legislature has this power, it may exercise it only when two-thirds of each house concur. In Kentucky two successive legislatures must approve the submission of the question. Quite generally it is required that the vote in each house shall be taken by the yeas and nays and entered in the journal.

4. Those which authorize the legislature to call a convention whenever it sees fit to do so.

At present only Georgia and Maine specifically authorize this procedure.

5. Those which are silent on the question.

2. *Legislative Authority to call a Constitutional Convention.*

About a dozen constitutions now in force, including that of Massachusetts, make no provision for calling a convention. The question has been raised in several States as to whether the legislature has authority, in the absence of such provision, to call a convention, and the courts have been called upon for an expression of opinion. Three instances particularly should be noticed.

The ninth article of the amendments to the Constitution of Massachusetts provides for the submission of specific amendments by the General Court. In 1833 the House of Representa-

[1] Von Holst, *Constitutional Law of the United States*, 294.

tives asked the justices of the Supreme Judicial Court for their opinion as to whether specific amendments could be submitted in any other manner. The justices replied, "We are of opinion . . . that, under and pursuant to the existing constitution, there is no authority given by any reasonable construction or necessary implication, by which any specific and particular amendment or amendments of the constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820."[1]

Since this opinion is much quoted as authority for the statement that a legislature in a State like Massachusetts, where a convention is not mentioned while another method of amendment is expressly provided, is not empowered to call a convention or submit the question to the people, some distinctions should be noted. In the first place the opinion is only an advisory opinion of the justices and is not entitled to the weight of a judicial decision. In the second place the opinion must be interpreted in the light of the peculiar form of the questions propounded by the House of Representatives. In the third place the justices interpreted the constitution as narrowly as they would have interpreted a statute. Had they applied the great maxim of Chief Justice Marshall, "We must never forget that it is a constitution we are expounding," they would probably have held that the authorization of one method of amendment does not prevent the employment of another.

The Constitution of Rhode Island is similar to that of Massachusetts in that it provides for the submission of specific amendments by the General Assembly and makes no provision for a convention. In 1883 the Senate of Rhode Island requested the judges of the Supreme Court to render an opinion as to the authority of the General Assembly either to call a convention or to submit the question to the voters. The judges replied, "We are of opinion that the mode provided in the Constitution for the amendment thereof is the only mode in which it can be constitutionally amended."[2] The judges fortified their conclusion by stating that the rule "*Expressio unius est exclusio alterius*" is as applicable to the interpretation

[1] Opinion of the Justices (1833), 6 Cushing, 575, 576. This opinion is printed in Appendix B.

[2] *In re* the Constitutional Convention (1883), 14 R. I. 649. This opinion is printed in Appendix B.

of a constitution as to the interpretation of a will, deed or statute.

The Constitution of Indiana, like those of Massachusetts and Rhode Island, provides for the submission of single amendments by the General Assembly, but makes no provision for a convention. In 1913 the General Assembly enacted a law submitting to the people the question of calling a convention. At the election in 1914 this question was answered in the negative by a majority of more than one hundred thousand. In the face of this adverse expression of opinion, the General Assembly, in 1917, enacted a law providing for the election of delegates to a constitutional convention. In proceedings brought to restrain the execution of this act, these questions, as stated by the court, were involved:

> Has the General Assembly authority to call a Convention to revise the Constitution of the State, or to make a new one, without first submitting the matter to the voters of the State and receiving an affirmative answer; and has the Legislature the authority to call a constitutional convention against the will of the people as expressed by the vote of 1914 on that question?

In an opinion not remarkable for its strength of logic the court asserted that providing for the calling of a constitutional convention is not an exercise of legislative power, and concluded:

> We are of the opinion that the will of the people as expressed in the election of 1914 is as binding on the General Assembly as a positive provision of the Constitution could be, and hence the action of the Legislature in calling a constitutional convention . . . is null and void.[1]

The dissenting opinion of Mr. Justice Lairy contains the following forceful argument, which is applicable in any State where there is no explicit provision concerning a convention:

> The holding that the Legislature is without power in this respect is based upon the proposition that the initiation of a movement by that body for the call of a constitutional convention is not ordinary legislation, and for that reason such power is not conferred by section 1, article 4, by which all legislative power is conferred upon the General Assembly.

[1] Bennett *v.* Jackson (1917), 186 Ind. 533.

It is said that the legislative power thus conferred carries authority to make and repeal laws as rules of civil conduct pursuant to the Constitution and to carry out the details of government so instituted, but that it does not carry or include authority for fundamental legislation. The conclusion reached is that, as the power to originate a movement for a new Constitution by calling a convention is not granted by the section of the Constitution last cited, the Legislature cannot possess such power unless an express grant thereof be found in some other part of the Constitution, or unless it be obtained by a direct vote from the people.

The statement that the Legislature may obtain from the people the power to call a constitutional convention admits that the General Assembly has power from some source to institute a movement of this kind by providing for the submission of such question to a vote of the people. This power is not directly conferred by the Constitution; and, under the holding of court, it is not one of the ordinary legislative powers granted by section 1 of article 4 of the Constitution. Whence then comes this power, and what is its nature? Within what limits may it be exercised, and how are such limits to be fixed? As the majority opinion holds that the power is not a legislative power, and that it is not conferred by the Constitution, it must be a political power resting in the General Assembly as the branch of government which most directly represents the people. This power is not granted by the Constitution, and that instrument places no limitations upon it. Can the court limit a power of a co-ordinate branch of government when the Constitution imposes no limitations? If the Legislature has power to initiate a movement of this kind, which all concede, what right has the court to place a limitation upon the power so long as its exercise does not conflict with any provision of fundamental law? If the Legislature has power to provide for the submission of the desirability of a new Constitution to a vote of the people, and may afterward call a convention, why deny that it has the power to call the Constitutional Convention first and provide that the desirability of the new Constitution shall be submitted to the people afterward? Neither of such powers is expressly granted by the Constitution, and neither of such acts is prohibited by it.[1]

Whatever legal doctrines these opinions establish, they clearly demonstrate the wisdom of embodying in the constitution a definite provision for the summoning of a constitutional convention.

3. *The Election and Compensation of Delegates.*

When a convention has been duly authorized, the question still remains as to how it shall be composed and how its members shall be chosen. The States differ considerably in the

[1] Bennett v. Jackson (1917), 183 Ind. 533, 542.

extent to which details of this sort are settled by constitutional provision. The Delaware Constitution of 1897 fixes the number of delegates at forty-one — the only one that is so specific. A good many States provide that the number of delegates shall bear some relation to the size of the legislature. The New York Constitution of 1894 provides that the convention shall be composed of three delegates from each senatorial district and fifteen delegates at large. In other States it is provided that the number of delegates shall be equal to the number of members of the legislature, or shall not be less than such number or shall not be greater than such number. In still other States the House of Representatives is taken as the guide in fixing the number of delegates, while in two or three States it is provided that the convention shall have twice as many members as the Senate. No State except New Hampshire provides for so large a body as the present Constitutional Convention of Massachusetts.

In almost all the States the time for the election of the delegates and the date of their assembling are left to the determination of the legislature. Almost everywhere, also, the important question of compensation of the delegates and other financial provision for the convention is likewise in the hands of the legislature. In view of the importance of the convention and the detail with which other matters are treated in the State constitutions, it is somewhat surprising that the legislatures are allowed so much discretion on these points.

4. *Self-executing Provisions for the Election and Assembling of a Constitutional Convention.*

A few constitutions provide for their amendment without any action whatever on the part of the legislature. The first of these is the Pennsylvania Constitution of 1776. The method here adopted was this:

> In order that the freedom of the commonwealth may be preserved inviolate forever, there shall be chosen by ballot by the freemen in each city and county respectively, on the second Tuesday in October, in the year one thousand seven hundred and eighty-three, and on the second Tuesday in October, in every seventh year thereafter, two persons in each city and county of this State, to be called the COUNCIL OF CENSORS;

who shall meet together on the second Monday of November next ensuing their election; the majority of whom shall be a quorum in every case, except as to calling a convention, in which two-thirds of the whole number selected shall agree. . . . The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.[1]

By this provision the function of proposing amendments, now usually assigned to the legislature, was performed by the Council of Censors, and the people ratified or rejected its proposals through a convention elected for the purpose. The plan seems good, but it did not work well in Pennsylvania. The Council of Censors held two stormy sessions, after which it never met again, and was abolished in 1790.[2]

The provision of the Pennsylvania Constitution of 1776 was copied almost *verbatim* by the Vermont Constitution of 1777, and was retained by that State until 1870. In the period from 1777 to 1870, thirteen Councils were elected, and many amendments were proposed. In a period of eighty-five years, the Council called ten conventions for the purpose of passing upon amendments. The number of changes suggested was often very large. The Council of 1834 proposed nineteen amendments, twelve of which were adopted; and the Council of 1848 proposed fifteen amendments, of which ten were adopted. Finally, in 1870, an amendment was ratified by which the Council itself was abolished, and Vermont adopted a mode of amendment similar to those employed by the other States.

The State of New York in 1894 adopted a method for summoning a constitutional convention independent of any action by the legislature and which, with necessary local adaptations, might well serve as a model for any State in the Union. The

[1] *Pennsylvania Constitution of 1776*, sec. 47.
[2] Jameson, *Constitutional Conventions*, 568.

New York Constitution of 1846 provided that in 1866 and each twentieth year thereafter the sense of the people should be taken as to the calling of a convention for revising the Constitution. This question was submitted in 1886 and was answered in the affirmative by a majority of more than 300,000. David B. Hill was Governor of New York at that time, however, and he and the Legislature were unable to agree upon a plan for the apportionment of delegates. In consequence the necessary legislation for the election and meeting of the convention could not be enacted. This deadlock continued until 1893, when provision was finally made for the election of delegates. When the Convention which assembled in Albany May 8, 1894, had the article relating to amendment under consideration, the members recalled how the attempt of the people for a revision of the Constitution had been thwarted for six years. Accordingly they rehabilitated a plan suggested but not adopted in the Massachusetts Convention of 1853. This plan was embodied in the New York Constitution in the following words:

At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and also at such times as the Legislature may by law provide, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the State, as then organized, shall elect three delegates at the next ensuing general election at which members of the Assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the Assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the Constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employés and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal and proceedings.

The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the Convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates at large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.[1]

This section of the Constitution seems to provide for every step that is necessary to the election and assembling of a convention and the submission of its work to the people except only that no provision is made for the expenses of the election of delegates. The New York plan was substantially copied by the Michigan Convention of 1907 and forms part of the Constitution of that State.

IV. Specific Amendments.

1. *The Formulation and Submission of Amendments.*

The adoption of specific amendments by the combined action of the legislature and the people is now provided for in all the States except New Hampshire, where amendments may be proposed only by a constitutional convention, and Delaware, where the legislature may adopt amendments without submitting them to the people. The procedure to be followed by the legislature is usually prescribed in considerable detail. The requirements relate to the vote necessary to propose amendments, the length of time for which they must be published, the vote required in the second legislature (when such action is necessary at all), and the method of final submission to the people.

In general, amendments may originate in either house, but there are two exceptions. In Vermont amendments must

[1] *Constitution of New York* (1894), Art. XIV, sec. 2.

originate in the Senate, receive the approval of two-thirds of the Senate and a majority of the House, and must then be referred to the next legislature. If they are then approved by a majority of each house they are referred to the people. In Connecticut a majority of the House of Representatives may originate amendments, and refer them, without any action on the part of the Senate, to the next legislature, when, if concurred in by two-thirds of each house, they are referred to the people.

In nineteen States amendments may be submitted by a majority of each house. In seventeen the assent of two-thirds of each house is necessary, and in seven there must be a three-fifths vote. Massachusetts requires the approval of the majority of the Senators and two-thirds of the members of the House of Representatives.

Many constitutions have required that proposed amendments should be submitted to a second legislature, but with the growth of biennial elections this so much prolonged the period required for the submission of an amendment that this provision is being gradually abandoned. Sixteen States, however, including Massachusetts, still require it. South Carolina has the illogical and cumbersome provision that a proposed amendment shall be submitted to a second legislature after it has been ratified by the people.

In order to serve as public notice many constitutions require that proposed amendments shall be published for a certain period before action is taken on them by the people. This is regarded as a matter of so much importance that it is regulated in considerable detail. In Delaware, for instance, there must be a publication in three papers in each county. In Maryland there must be publication in two papers in each county, except in the city of Baltimore, where publication in three papers, one to be in the German language, is required. Georgia requires publication in one paper in each congressional district. The length of the period of publication varies greatly. In a few cases public notice without any specified length of time is required. In others the period is fixed at four weeks, six weeks, two months, ninety days, four months, six months, and even twelve months. By far the largest number require publica-

tion for three months only. Publication in the newspapers usually attracts so little attention that several States now attempt to reach the individual voter in a more direct way. In California, for instance, a pamphlet containing not only the text of the proposed amendment but arguments for and against is sent to each voter. This device has been adopted in several other States, particularly in those in which amendments may be proposed by popular petition. Testimony as to its success widely varies.

As it is the intention that the legislature shall submit only specific amendments and shall not undertake a general revision of the constitution, various provisions have been adopted for the purpose of limiting the extent to which the legislature may go. In Vermont amendments may be submitted only at the beginning of each decade. In New Jersey and Pennsylvania they may be submitted not more than once in five years, and in Tennessee not more than once in six years. In Kentucky an amendment that is rejected may not be re-submitted for five years. Montana, Kansas and Arkansas allow not more than three amendments to be proposed at the same election, and Kentucky limits the number to two. In Indiana and Oregon, while an amendment is awaiting the action of the succeeding legislature, no other amendment may be proposed. Kentucky requires that each amendment shall relate to but one subject. Illinois allows but one amendment to be proposed at each session of the legislature, while in Colorado the number is limited to six. In Illinois an amendment to the same article may be proposed but once in four years.

Beginning in 1902 provision has been made in several States for the submission of amendments through the instrumentality of an initiative petition. The constitutions of these States prescribe in much detail the process which is to be followed. The rules set forth relate to the form of the amendment, the number of signatures required, methods of obtaining and verifying signatures, publication, notice to the voters, time of submission and the vote necessary for ratification.[1]

Specific amendments may also be submitted by a constitutional convention. While this body is usually thought of as the

[1] This method of amendment is fully described in Bulletin No. 6, *The Initiative and Referendum.*

instrument for effecting a general constitutional revision, no hard and fast line can be drawn between a general revision and specific amendment. In practice the work of constitutional conventions has been submitted in both forms. The Michigan Convention of 1907–1908 submitted its work in the form of a revised constitution which was accepted as a whole. The Ohio Convention of 1912 submitted a series of specific amendments. The New York Convention of 1915 submitted a revised constitution, but provided for a separate vote on two articles. The Massachusetts Convention of 1917–1918 is submitting a series of specific amendments.

2. *The Ratification of Amendments.*

In every State except Delaware amendments proposed by the legislature or by an initiative petition must be submitted to the people for ratification. It is commonly provided that when more than one amendment is submitted at the same election they shall be so submitted that the voters may vote upon each one separately. Even when an entire constitution is submitted for approval it is not uncommon for provision to be made for a separate vote upon particular sections. In nineteen States the approval of a majority of the voters who vote upon an amendment is sufficient for its ratification, but in sixteen States the approval of a majority of all the voters voting at the election at which the amendment is submitted is required. In such States ratification is difficult, for the indifference of voters to proposals for constitutional amendment is notorious and widespread. It has been calculated that in the decade from 1898 to 1908 449 amendments were submitted, 310 of which were voted upon by less than 60 per cent of the voters who went to the polls; 239 by less than 50 per cent; and 37 by less than 25 per cent. Of the 296 which were adopted, only 68 received the approval of a majority of the voters who participated in the election. On the other hand 41 received a majority of the votes cast on the amendments, but failed because they did not receive a majority of the votes cast at that election. Several explanations have been offered for this indifference. Much of it is evidently due to the trivial character of the amendments submitted, but even when the amendment is

an important one it is difficult to arouse popular interest in abstract propositions of law. Furthermore there is usually little discussion of the amendment either on the platform or in the press, and such discussion as takes place in the legislature or convention is forgotten by the time the election arrives.

Those States which require amendments to receive the approval of a majority of all the voters participating in the election have found that their constitutions are practically unamendable and have resorted to some ingenious devices in order to insure ratification. In Alabama, for instance, when an amendment relating to the city of Birmingham was submitted, it was provided that the words "For the Birmingham amendment" should be printed on the ballot, and every ballot cast was to be counted in favor of the amendment unless those words were erased. Usually the failure of a voter to take action on an amendment counts against it, but by this device Alabama made a voter's inaction count in favor of the amendment.

In Nebraska and Ohio a plan was devised for placing political parties on record as to proposed amendments and letting the action of the party stand as the vote of any elector who voted a straight party ticket. In those States it was provided that proposed amendments should be printed upon the primary election ballot of each political party, and if a majority of the electors of any party voting upon such an amendment voted either for or against it such action should be construed to be the action of the party, and any voter who cast a straight party ticket thereby voted for his party's action on the amendment. This system was employed for several years in Ohio, and its working was well illustrated in the election of 1903. In that year five amendments were submitted. One had been indorsed by both Republicans and Democrats and received the general support of both. One amendment had been indorsed by the Republicans and was opposed by the Democrats. As the Republicans carried the election this amendment was adopted. Another amendment to which the Republicans invited "careful consideration," while the Democrats supported it, was lost. The fifth amendment was not indorsed by either party and only 53,774 voters out of 877,203 took the trouble to express an opinion upon it. This vote shows how weighty was the influence of party indorsement.

V. Results.

A study of the development of the various processes of amendment which have been tried by the States reveals certain well-defined results.

1. There is universal recognition of the fact that every constitution should contain some provision for its amendment. This is made all the more necessary by the statutory character of many of the provisions now inserted in constitutions. Even in their most elemental provisions such instruments must be kept in harmony with changing public opinion and social and economic conditions.

2. There is an almost universal recognition of the constitutional convention as a normal and legal governmental agent. However much such bodies may have been associated originally with revolution and employed as the organ for effecting a break in legal continuity, they have now lost that character and have taken their place in American jurisprudence as normal and lawful agencies for effecting constitutional change. Occasionally a convention is found which, like the Illinois Convention of 1862 and the Mississippi Convention of 1890, regards itself as the embodiment of popular sovereignty and hence free from any restraints of existing law, either constitutional or statutory. These are becoming less and less frequent and represent a conception of the constitutional convention which is bound to pass away.

3. Except in a few States where a large part of the nominal voting population is habitually disfranchised, it is universally held that constitutional changes, whether initiated by a convention or a legislature or a popular petition, must be ratified by a popular vote. Even when this is not required by express constitutional provision, the practice is general.

4. There is an increasing sentiment in favor of providing some method of constitutional amendment which will operate independent of action by the legislature. The mode adopted by New York in 1894 has been adopted in but one other State, but the rapid growth of the popular initiative of constitutional amendments is an evidence of the desire to make it impossible for legislative bodies to prevent changes which the people wish.

Appendix A.

THE PROCEEDINGS OF THE TOWN OF CONCORD, MASSACHUSETTS, OCTOBER 22, 1776.

At a meeting of the Inhabitents of the Town of Concord being free & twenty one years of age and upwards met by adjournment on the twenty first Day of October 1776 to take into Consideration a Resolve of the Hon^{ble}. House of Representatives of this State on the 17th of September Last the Town Resolved as follows ——

Resolve 1st. That this State being at Present destitute of a Properly established form of Government, it is absolutly necessary that one should be emmediatly formed and established ——

Resolved 2 That the Supreme Legislative, either in their Proper Capacity, or in Joint Committee, are by no means a Body proper to form & Establish a Constitution, or form of Government; for Reasons following. first Because we Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession & enjoyment of their Rights and Priviliges, against any Encroachments of the Governing Part — 2^{d}. Because the Same Body that forms a Constitution have of Consequence a power to alter it. 3^{d}. Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights & priviliges. Resolve 3^{d}. That it appears to this Town highly necessary & Expedient that a Convention, or Congress be immediately Chosen, to form & establish a Constitution, by the Inhabitents of the Respective Towns in this State, being free & of twenty one years of age, and upwards, in Proportion as the Representatives of this State formerly were Chosen; the Convention or Congress not to Consist of a greater number then y^{e} house of assembly of this State heretofore might Consist of, Exccept that each Town & District shall have Liberty to send one Representative, or otherwise as Shall appear meet to the Inhabitents of this State in General.

Resolve 4th. that when the Convention, or Congress have formed a Constitution they adjourn for a Short time, and Publish their Proposed Constitution for the Inspection & Remarks of the Inhabitents of this State. Resolved 5^{ly}. that the Hon^{ble}. house of assembly of this State be Desired to Recommend it to the Inhabitents of the State to Proceed to Chose a Convention or Congress for the Purpas abovesaid as soon as Possible ——

A True Copy of the Proceeding, of the Town of Concord at the General Town meeting above mentioned —att^{s}. Ephraim Wood Jun^{r}. Town Clerk. —

Concord October y^{e} 22. 1776.

— *Massachusetts Archives*, Vol. 156, p. 182.

Appendix B.

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1833.

6 Cushing, 573.

Opinion of the Justices of the Supreme Judicial Court concerning the Altering or Revising of the Constitution in Any Specific Part thereof.

The justices of the supreme judicial court have taken into consideration the two questions submitted to them, (by the house of representatives), and upon which the honorable house has requested their opinion, of the following tenor, namely:

First. — Whether, if the legislature should submit to the people to vote upon the expediency of having a convention of delegates of the people, for the purpose of revising or altering the constitution of the commonwealth in any specified parts of the same; and a majority of the people voting thereon should decide in favor thereof, could such convention holden in pursuance thereof act upon, and propose to the people, amendments in other parts of the constitution not so specified?

Second. — Can any specific and particular amendment or amendments to the constitution be made in any other manner, than that prescribed in the ninth article of the amendments adopted in 1820?

And thereupon have the honor to submit the following opinion:

The court do not understand, that it was the intention of the house of representatives, to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them. Considering the questions in this light, we are of opinion, taking the second question first, that, under and pursuant to the existing constitution, there is no authority given by which any specific and particular amendment or amendments of the constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820. Considering that previous to 1820 no mode was provided by the constitution for its own

amendment, that no other power for that purpose, than in the mode alluded to, is anywhere given in the constitution, by implication or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and the power of altering the constitution thereby conferred to have been cautiously restrained and guarded, we think a strong implication arises against the existence of any other power, under the constitution, for the same purposes.

Upon the first question, considering that the constitution has vested no authority in the legislature, in its ordinary action, to provide by law for submitting to the people the expediency of calling a convention of delegates, for the purpose of revising or altering the constitution of the commonwealth, it is difficult to give an opinion upon the question, what would be the power of such a convention, if called. If, however, the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and, upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the constitution not so specified.

LEMUEL SHAW.
SAMUEL PUTNAM.
S. S. WILDE.
MARCUS MORTON.

JANUARY 24, 1833

Appendix C.

OPINION OF THE JUSTICES OF THE SUPREME COURT OF RHODE ISLAND, 1883.

14 Rhode Island, 649.

In re the Constitutional Convention.

Article 13 of the Constitution of the State of Rhode Island is as follows:

The General Assembly may propose amendments to this Constitution by the votes of a majority of all the members elected to each house. Such propositions for amendment shall be published in the newspapers, and printed copies of them shall be sent by the secretary of state, with the names of all the members who shall have voted thereon, with the yeas and nays, to all the town and city clerks in the state. The said propositions shall be, by said clerks, inserted in the warrants or notices by them issued for warning the next annual town and ward meetings in April; and the clerks shall read said propositions to the electors when thus assembled, with the names of all the representatives and senators who shall have voted thereon, with the yeas and nays, before the election of senators and representatives shall be had. If a majority of all the members elected to each house, at said annual meeting, shall approve any proposition thus made, the same shall be published and submitted to the electors in the mode provided in the act of approval; and if then approved by three fifths of the electors of the State present and voting thereon in town and ward meetings, it shall become a part of the Constitution of the State.

Article 10, section 3, provides, that "the judges of the Supreme Court shall . . . give their written opinion upon any question of law whenever requested . . . by either house of the General Assembly."

March 20, 1883, the Senate of the State adopted the following resolution:

Whereas, a difference of opinion has arisen among members of the General Assembly,

I. As to the legal competency thereof under the Constitution of the State to call upon the electors to elect members to constitute a convention to frame a new Constitution of the State, and to provide that the new Constitution should be submitted for adoption, either to the qualified electors of the State, or to the persons who would be entitled to vote under said new Constitution, for adoption, and if a majority of such electors or persons voting should vote in favor thereof, whether the new Constitution would then become the legally adopted Constitution of the State and be binding as such upon all of the people thereof.

II. As to whether it is legally competent for the General Assembly to submit to the qualified electors the question whether said electors will call a convention to frame a new Constitution, and to provide by law if a majority of the electors voting upon said question shall vote in favor of calling such convention, that the same be held, and the new Constitution framed by said Convention be submitted to the electors for their adoption, either to the electors qualified by law, or to the persons who may be qualified to vote under such new Constitution, and whether if a majority of the electors, or persons voting thereon, vote for the adoption of

such Constitution, whether the Constitution so to be framed and adopted would be the legal Constitution of the State, and as such be binding upon all the people thereof.

And whereas, the existing Constitution provides that either house of the General Assembly may require the opinion of the judges of the Supreme Court upon any question of law, it is therefore hereby

Resolved, that the said judges of the said Supreme Court be, and they hereby are requested without unnecessary delay to give their opinion to the Senate upon the two questions stated in the preamble hereto, upon which differences of opinion have arisen between the members of this General Assembly.

Resolved, that His Excellency the Governor be, and he hereby is requested to forward copies of the preceding preamble and resolution to each of the judges of the said Supreme Court.

Opinion of the Court.

March 30, 1883.

To the Honorable the Senate of the State of Rhode Island and Providence Plantations.

We received from your Honors on the 24th inst. a resolution requesting our opinion in regard to the legal competency of the General Assembly to call a convention for the revision of the Constitution. In reply we have to say that we are of opinion that the mode provided in the Constitution for the amendment thereof is the only mode in which it can be constitutionally amended. The ordinary rule is that where power is given to do a thing in a particular way, there the affirmative words, marking out the particular way, prohibit all other ways by implication, so that the particular way is the only way in which the power can be legally executed. The rule was recently recognized by the Supreme Court of the United States in Smith *v.* Stevens, 10 Wall. 321. There by act of Congress lands were ceded to Indians with power to sell them, or parts of them, in a particular manner, and the court held that a sale in any other manner was void. The rule was likewise recently recognized by the English Court of Exchequer in a case in which it was thus expressed: "If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined: '*Expressio unius est exclusio alterius.*' " North Stafford Steel &c. Co. *v.* Ward L. R. 3 Exch. 172, 177. Cases to the same point might be indefinitely multiplied. 1 Kent Comment. *467, note *d;* 1 Sugden on Powers, 258 *et sq.;* City of New Haven *v.* Whitney, 36 Conn. 373; District Township of the City of Dubuque *v.* The City of Dubuque, 7 Iowa, 262. It has been claimed, indeed, that the rule, though applicable in the interpretation of statutes, deeds, wills, and other ordinary instruments, is inapplicable in the interpretation of a state constitution. Those who assert this difference, however, do not appear to have any reason to give for it but this, namely: that under stress of strong political excitement, the rule, if it exists, is pretty sure to be disregarded, as past experience proves, and therefore it is better to conclude that it does not exist. We do not consider the reason satis-

factory. The rule is simply a guide to the meaning of language when used in a particular way, and we do not see why it is not as trustworthy a guide to the meaning when the language so used occurs in a state constitution, as when it occurs in a statute or a will. Men do not put away their spontaneous and habitual modes of expressing themselves merely because they are engaged in the unaccustomed work of framing or adopting a constitution. In this view we are not without precedent. One of the greatest of modern jurists, Chief Justice Shaw, was of the same way of thinking, and, conjointly with his associates, declared it to be his opinion that the Constitution of Massachusetts is constitutionally amendable only as therein provided.[1]

The provision for amendment in our Constitution is singularly explicit. The proposed amendment is first to pass the two houses of the General Assembly by a majority of the members elected; it is then to be published, with the vote thereon, in the newspapers, and otherwise brought to the attention of the people; it is then to pass the assembly elected after such publication by a majority of both houses; and finally it is to be submitted to the approval of the electors, and if it be approved by three fifths of the electors voting, and not otherwise, it is to become incorporated in the Constitution. Evidently the purpose was to insure the calm and considerate action of both the assembly and the people. It was to pass two assemblies, so that the members of the second, elected after publication, might, if the electors thought proper, be elected specially to consider it. The popular mind was not to be taken by surprise or to be carried away by any sudden sentiment, but it was to act deliberately after reflection. To this end a three fifths vote was required for approval. The object was not to hamper or baffle the popular will, but to insure its full expression. Our ancestors knew, what we all know, that in spite of all precautions a majority may be worked up for an occasion, which is not the true and permanent majority. They also knew, what we all know, that many electors, perfectly satisfied with the existing state of things, stay away from the polls on election day from mere inertness of temperament. It is inconceivable to us, that they would have elaborated so guarded a mode of amendment, unless they had intended to have it exclusive and controlling. They doubtless did so intend, and if they did, we cannot say they did not, simply because since then the constitutions of other states, having similar provisions, have been amended through the medium of conventions. The framers of our Constitution could not foreknow this action in other states, and therefore cannot have been influenced by it. If our Constitution had no provision for amendment, then, indeed, a power in the assembly to call a convention or to initiate amendments in some other manner might be implied *ex necessitate*. The assembly, under the charter, exercised such a power because the charter had no such provision; though it is proper to remark that under the charter the legislative power of the assembly was practically unlimited.

[1] Opinion of the Justices, 6 Cush. 573.

Again, if the provision for amendment was impracticable, there might be, if no legal reason, yet some excuse for disregarding it. But it is practicable, as a successful resort to it in several instances has demonstrated. The only things which can be said against it are that it is dilatory, and that it requires the assent of more than a bare majority. But these are the very things which recommended it to its authors, and therefore they cannot be alleged as reasons for believing that they did not mean it to be exclusive and controlling.

Our Constitution is, by its own express declaration, the supreme law of the State; any law inconsistent with it is void, and, therefore, if the provision which it contains for its own amendment is exclusive, implying a prohibition of amendments in any other manner, then, of course, any act of the assembly providing for a convention to amend the Constitution is unconstitutional and void.

An argument in favor of a convention has been suggested which is not specifically met in the preceding. It is this, namely: that though the General Assembly has no power to introduce amendments and carry them to their consummation in any manner not provided in the Constitution, it nevertheless has power to call a convention to frame a new constitution for submission to the people. The argument is, in our opinion rather specious than sound. The convention, if called, would be confined by the Constitution of the United States to the formation of a constitution for a republican form of government, and our present Constitution contains the fundamental provisions, the great ground plan, of such a form of government as it is known throughout the Union. Any changes which are in contemplation are merely changes of superstructure or detail. Our Constitution, too, contains in its Bill of Rights the great historic safeguards of liberty and property, which certainly no convention would venture either materially to alter or to abolish. Any new constitution, therefore, which a convention would form, would be a new constitution only in name; but would be in fact our present Constitution amended. It is impossible for us to imagine any alteration, consistent with a republican form of government, which cannot be effected by specific amendment as provided in the Constitution.

Again, it has been maintained that the General Assembly has power to call a convention under section 10, of article 4, which provides that "the General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this Constitution." But, under this section, the General Assembly can only exercise powers which are not prohibited; and, if the provision for amendment is, as we think it is, exclusive, then a power to call a convention is prohibited by implication, and, as was clearly shown in Taylor *v.* Place, 4 R. I. 324, an implied is as effectual as an express prohibition.

Finally, it has been contended that there is a great unwritten common law of the states, which existed before the Constitution, and which the Constitution was powerless to modify or abolish, under which the people

have the right, whenever invited by the General Assembly, and as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this State recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional change. Our Constitution is, as already stated, by its own terms, "the supreme law of the State." We know of no law, except the Constitution and laws of the United States, which is paramount to it.

We think the foregoing is in effect, if not in form, an answer to the questions propounded to us in the resolutions. The questions are extremely important, and we should have been glad of an opportunity to give them a more careful study, but under the request of the Senate for our opinion, "without any unnecessary delay," we have thought it to be our duty to return our opinion as soon as we could, without neglecting other duties, prepare it.

THOMAS DURFEE.
CHARLES MATTESON.
JOHN H. STINESS.
P. E. TILLINGHAST.
G. M. CARPENTER, JUN.

Appendix D.

TYPICAL CONSTITUTIONAL PROVISIONS FOR AMENDMENT THROUGH THE ACTION OF A LEGISLATURE OR CONVENTION.

California.

Article XVIII. — Amending and Revising the Constitution.

Section 1. Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and if two thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in their journals, with the yeas and nays taken thereon; and it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such manner, and at such time, and after such publication as may be deemed expedient. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished, by numbers or otherwise, that each can be voted on separately. If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this Constitution.

Sec. 2. Whenever two thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote, at the next general election, for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. The convention shall consist of a number of delegates not to exceed that of both branches of the Legislature, who shall be chosen in the same manner, and have the same qualifications, as members of the Legislature. The delegates so elected shall meet within three months after their election, at such place as the Legislature may direct. At a special election to be provided for by law, the constitution that may be agreed upon by such convention shall be submitted to the people for their ratification or rejection, in such manner as the convention may determine. The returns of such election shall, in such manner as the convention shall direct, be certified to the Executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the returns so certified to him; and it shall be the duty of the Executive to declare, by his proclamation, such constitution as may have been ratified by a majority of all the votes cast at such special election to be the Constitution of the State of California.

ILLINOIS.

Article XIV. — Amendments to the Constitution.

SEC. 1. Whenever two-thirds of the members of each house of the General Assembly shall, by a vote entered upon the journals thereof, concur that a convention is necessary to revise, alter or amend the Constitution, the question shall be submitted to the electors at the next general election. If a majority voting at the election vote for a convention, the General Assembly shall, at the next session, provide for a convention, to consist of double the number of members of the Senate, to be elected in the same manner, at the same places and in the same districts. The General Assembly shall, in the Act calling the convention, designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the constitution of the United States and the State of Illinois, and to faithfully discharge their duties as members of the convention. The qualification of members shall be the same as that of members of the Senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the General Assembly. Said convention shall meet within three months after such election and prepare such revision, alteration or amendments of the Constitution as shall be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two or more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendments shall take effect.

SEC. 2. Amendments to this Constitution may be proposed in either house of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals, and said amendments shall be submitted to the electors of this State for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this Constitution. But the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session nor to the same article oftener than once in four years.

Article XV. — Mode of Amending the Constitution.

Section 1. This Constitution may be amended and revised only in pursuance of the provisions of this article.

Sec. 2. The General Assembly may, at any time, propose such amendments to this Constitution as a majority of the members elected to each house shall deem expedient; and the vote thereon shall be taken by yeas and nays, and entered in full on the journals. The proposed amendments shall be published with the laws of that session, and also shall be published weekly in some newspaper, if such there be, within each county in the State, for four consecutive weeks next preceding the general election then next ensuing. The proposed amendments shall be submitted to a vote of the people, each amendment separately, at the next general election thereafter, in such manner as the General Assembly may provide. If a majority of the qualified voters of the State, voting for and against any one of said amendments, shall vote for such amendment, the same shall be deemed and taken to have been ratified by the people, and shall be valid and binding, to all intents and purposes, as a part of this Constitution.

Sec. 3. The General Assembly may at any time authorize, by law, a vote of the people to be taken upon the question whether a convention shall be held for the purpose of revising and amending the Constitution of this State; and if at such election a majority of the votes on the question be in favor of a convention, the Governor shall issue writs to the sheriffs of the different counties, ordering the election of delegates to such a convention, on a day not less than three and within six months after that on which the said question shall have been voted on. At such election each Senatorial district shall elect two delegates for each Senator to which it may then be entitled in the General Assembly, and every such delegate shall have the qualifications of a State Senator. The election shall be conducted in conformity with the laws regulating the election of Senators. The delegates so elected shall meet at such time and place as may be provided by law, and organize themselves into a convention, and proceed to revise and amend the Constitution; and the Constitution, when so revised and amended, shall, on a day to be therein fixed, not less than sixty days or more than six months after that on which it shall have been adopted by the convention, be submitted to a vote of the people for and against it, at an election to be held for that purpose; and if a majority of all the votes given be in favor of such Constitution, it shall, at the end of thirty days after such election, become the Constitution of this State. The result of such election shall be made known by proclamation by the Governor. The General Assembly shall have no power, otherwise than in this section specified, to authorize a convention for revising and amending the Constitution.

Ohio.

Article XVI. — Amendments.

Sec. 1. Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately.

Sec. 2. Whenever two-thirds of the members elected to each branch of the general assembly shall think it necessary to call a convention, to revise, amend, or change this constitution, they shall recommend to the electors to vote on a separate ballot without party designation of any kind at the next election for members to the general assembly, for or against a convention; and if a majority of all the electors, voting for and against the calling of a convention, shall have voted for a convention, the general assembly shall, at their next session, provide, by law, for calling the same. Candidates for members of the constitutional convention shall be nominated by nominating petitions only and shall be voted for upon one independent and separate ballot without any emblem or party designation whatever. The convention shall consist of as many members as the house of representatives, who shall be chosen as provided by law, and shall meet within three months after their election, for the purpose, aforesaid.

Sec. 3. At the general election to be held in the year one thousand nine hundred and thirty-two, and in each twentieth year thereafter, the question: "Shall there be a convention to revise, alter or amend the constitution," shall be submitted to the electors of the state; and in case a majority of the electors, voting for and against the calling of a convention, shall decide in favor of a convention, the general assembly, at its next session, shall provide, by law, for the election of delegates, and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon.

Utah.

Article XXIII. — Amendments.

Section 1. Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; and the Legislature shall cause the same to be published in at least one newspaper in every county of the State where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the State, for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately.

Sec. 2. Whenever two-thirds of the members, elected to each branch of the Legislature, shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote, at the next general election, for or against a convention, and, if a majority of all the electors voting at such election, shall vote for a convention, the Legislature, at its next session, shall provide by law for calling the same. The convention shall consist of not less than the number of members in both branches of the Legislature.

Sec. 3. No Constitution, or amendments adopted by such Convention, shall have validity until submitted to, and adopted by, a majority of the electors of the State voting at the next general election.

Wisconsin.

Article XII. — Amendments.

Section 1. Any amendment, or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment, or amendments, shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election; and shall be published for three months previous to the time of holding such election, and if, in the legislature so next chosen, such proposed amendment, or amendments, shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment, or amendments, to the people in such manner, and at such time, as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors voting thereon, such amendment or amendments, shall become part of the con-

stitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

SECTION 2. If at any time a majority of the senate and assembly shall deem it necessary to call a convention to revise or change this constitution, they shall recommend to the electors to vote for or against a convention at the next election for members of the legislature. And if it shall appear that a majority of the electors voting thereon, have voted for a convention, the legislature shall, at its next session, provide for calling such convention.

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BULLETIN No. 36

THE REMOVAL OF JUDGES IN MASSACHUSETTS

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THE REMOVAL OF JUDGES IN MASSACHUSETTS.

I. The English Precedents.

Important as it is to preserve the independence of the judiciary, it must nevertheless be recognized that occasions will arise when the interests of the public will require that a judge should be removed from office. For this purpose two methods were developed in England, — removal on conviction by the House of Lords on charges brought by the House of Commons and removal on address to the Crown by the two houses of Parliament.[1]

Impeachment is an ancient process — how ancient it is difficult to determine. Sir James Fitzjames Stephens says that the first impeachment was that of the Welsh prince David, brother of Llewellyn, in 1283. The learned historian of the House of Lords, Luke Owen Pike, finds the first instance in 1376, and in this date he is supported by Hallam and Sir William Anson, who however appear not to have the same case in mind. It must be said also as to all these early cases, that they present all the irregularities which are to be expected in an experimental period before a settled procedure had been developed. Impeachment is now always thought of as the process whereby a public officer is brought to trial before one branch of the legislature on charges that are preferred by the other branch. It was not however until 1399 that this became the settled procedure in England. Prior to that time, the charge might be brought by the King or his representative or by members of the House of Commons or of the House of Lords or even by officials who had no direct responsibility in the matter. So also the impeached official might be brought to trial before the King alone, or the King sitting with the

[1] It has been held upon the high authority of Lord Denman that any officer whose tenure is during good behavior is subject to removal not only by impeachment and address but also by a writ of *scire facias* for the repeal of his patent or commission and by a criminal information at the suit of the Attorney-General. *Journals of the House of Lords*, LXII, 602.

House of Lords, while instances are not unknown in which impeachments were heard by a group of notables comprising knights, peers and representatives of the boroughs and cities, and there is one instance of an impeachment trial by a jury. In his effort to establish the personal authority of the Crown, Richard II sought to reserve to himself the exclusive power to remove judges and other officials, and in 1387 he sought the opinion of the judges as to whether "the lords and commoners can, without the will of the King, impeach in Parliament any of the said judges and officers for any of their offences." The compliant judges replied that they could not, and added, "If any one should do so, he is to be punished as a traitor". The King's policy on this question was one of the causes which finally brought about his deposition, and shortly afterward Parliament passed a statute by which impeachment proceedings were regulated.[1] When this statute was supplemented by the refusal of the House of Lords to try any impeachment not brought by the House of Commons, the process was given the form which it has ever since retained.

Although a regular judicial process for the orderly removal of officers was developed, the Crown still exercised a large degree of control over the judges. Since their commissions ran during the pleasure of the sovereign, decisions which were displeasing to him frequently led to their removal. One of the chief grievances of the people of England against the Stuarts was their arbitrary interference with the course of justice through the dismissal of judges whose decisions they disliked, and one of the great advances in the development of constitutional liberty was the provision in the Act of Settlement of 1700 that the "judges' commissions be made *quamdiu se bene gesserint,* and their salaries ascertained and established; but upon address of both Houses of Parliament it may be lawful to remove them."[2]

The extent to which impeachment has been made use of has varied greatly at different periods in English history. When it was first given a settled form it was for many years much used, but in the reign of Edward IV and the monarchs of the Tudor family no instances of it occurred. These astute princes possessed such control over Parliament that they were

[1] 1 Henry IV, ch. 14.

[2] 12 & 13 William III, ch. 2.

able to reach obnoxious subjects more expeditiously by means of a bill of attainder or of pains and penalties. The Star Chamber was also an effective weapon in their hands. With the coming of the Stuarts and their pretensions to absolute government, Parliament again had recourse to impeachment and from the trial of Lord Bacon in 1620 to the outbreak of the Revolution in 1688 about forty instances of it are found. Then came a gradual decline and under William III, Queen Anne and George I, a period of nearly forty years, there were but fifteen. In the reign of George II there was but one case, and since the impeachment of Warren Hastings in 1788 and of Lord Melville in 1805 there has been no further use of this procedure in England.

The process of removal by address has been invoked unsuccessfully several times in England, but in only one instance has an address been complied with by the Crown. In 1830 the two houses requested the removal of Sir Jonah Barrington from his office of Judge of the High Court of Admiralty in Ireland because of malversation in office, and the King acceded.

The English processes of removal by impeachment and by address were transplanted to America, but differences were made. This is especially notable as to the process of impeachment, which is not regarded in the same light in the two countries nor does it necessarily have the same legal results. In England an impeachment is distinctly a criminal proceeding differing from other criminal prosecutions chiefly in the fact that it is brought in a different forum. While at the present time it would be applied only in a case where the accused was a public official, it has not been so confined in the past, but has been used against private citizens who had no official status. Furthermore it is undertaken primarily for the purpose of punishing an offense against the laws and only indirectly for the purpose of protecting the public by removing the offender from office. Hence the important consequence follows that one who has been tried upon impeachment for crime cannot be brought before another criminal tribunal for the same offense. In America on the other hand, the process of impeachment is applied only to public officers. Furthermore it is undertaken not primarily for the punishment of the offender but for the

purpose of protecting the public by removing him from office and in some cases by making him ineligible to office in the future. In consequence an officer who has been convicted and removed from office is still subject to indictment and punishment under the ordinary laws of the land.

II. Constitutional Provisions in Massachusetts.

The Constitution of Massachusetts contains several provisions touching the removal of judges from office. Some are general in their nature and apply to all officers of the Commonwealth. Others apply only to the judges. Of the first kind are the provisions for the making and trial of impeachments. These are as follows:

> The House of Representatives shall be the Grand Inquest of this Commonwealth; and all impeachments made by them shall be heard and tried by the Senate.[1]
>
> The Senate shall be a court with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and mal-administration in their offices. But previous to the trial of every impeachment the members of the Senate shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence. Their judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit, under this Commonwealth. But the party so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment according to the laws of the land.[2]

Other parts of the Constitution provide a mode for removing judicial officers which cannot be employed for the removal of non-judicial officers.[3] The first of these is as follows:

> All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision in this Constitution: Provided nevertheless, the Governor, with consent of the Council, may remove them upon the address of both Houses of the Legislature.[4]

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[1] *Constitution of Massachusetts*, Part II, ch. I, sec. III, par. VI.

[2] *Ibid.*, Part II, ch. I, sec. II, par. VIII.

[3] Until the adoption of Article IV of the Amendments in 1821, officers of the militia could also be removed upon the address of the two houses.

[4] *Constitution of Massachusetts*, Part II, ch. III, par. I.

In its original form the Constitution provided that justices of the peace, unlike other judicial officers, should be appointed for a term of seven years, but could be removed only by impeachment or upon the address of the two houses.[1] But in 1907, the thirty-seventh Article of Amendment was adopted in the following terms:

> The governor, with the consent of the council, may remove justices of the peace and notaries public.

These constitutional provisions may be briefly summarized as follows:

1. All officers, both judicial and non-judicial, with the possible exception of justices of the peace and notaries public, may be removed upon impeachment by the House and conviction by the Senate.

2. Judicial officers, with the possible exception of justices of the peace and notaries public, may be removed by the Governor, with the consent of the Council, upon the address of the two houses of the General Court.

3. Justices of the peace and notaries public may be removed by the Governor with the consent of the Council.

In view of the explicit provision made for the removal of justices of the peace and notaries public by the Governor and Council, it might be argued that this method is exclusive and that they are not subject to removal by the process of impeachment or upon the address of the two houses of the General Court. The question has not yet arisen, and since any circumstances sufficient to induce action by the General Court would almost certainly be sufficient to induce action by the Governor and Council, it is not likely to be made an issue.

III. The Rebel Justices of the Peace.

The first occasion for the removal of judges in Massachusetts after the Revolution grew out of that pathetic and ill-advised insurrection known as Shay's Rebellion. Massachusetts had passed through hard times. A large debtor class had grown up. To them the courts, which were used to compel them to

[1] *Constitution of Massachusetts*, Part II, ch. III, par. III.

meet their financial obligations, seemed organs of oppression, and when the western counties broke out in open rebellion one of the chief objects of the insurgents was to prevent the courts from holding their sessions. In a movement so widespread it is not surprising to find that some of the inferior judges themselves became involved and joined in the outbreak. When order was finally restored, the records indicate that the governing authorities were disposed to show a lenient spirit toward the insurgents and to offer them a free pardon, but they were not inclined to show mercy to the judges who had participated in the disturbance. It was against these offenders that the General Court first used the power with which it was vested by the Constitution of 1780. At the extra session called by Governor Bowdoin because of the insurrection, the two houses on March 5, 1787, adopted the following address:

May it please your Excellency. The two Houses of Legislature, being authorized by the Constitution, to address your Excellency to Remove from office, such persons, as they shall deem unworthy of sustaining the offices, to which they have been appointed; and it appearing to them, that Will[m] Whiting of Great Barrington, in the County of Berkshire, first Justice of the Court of Common Pleas, and a Justice of the peace for said County, James Perry of Easton in the County of Bristol, a Justice of the peace in the County last mentioned, and Reuben Taft of Uxbridge, in the County of Worcester, and one of the Coroners for the said County of Worcester, have, in the late unhappy Rebellion, conducted in a manner, derogatory to Government, & disgraceful to themselves. — They have therefore, thought proper to request, and do hereby request your Excellency, by and with the advice & consent of council, to remove the said William Whiting, James Perry & Reuben Taft from their respective Offices aforesaid. Provided that your Excellency and the Honble Council after due enquiry, shall find sufficient evidence to justify such removal.[1]

The proceedings of the Governor and Council on this address are indicated in the following minutes of the meeting of March 8, 1787:

His Excellency laid before the Council an address of both Houses of the Legislature of the sixth of March instant for the removal of William Whiting of Great Barrington in the County of Berkshire first Justice of the Court of Common Pleas & a Justice of the Peace for said County —

[1] *Massachusetts Archives*, vol. 189, p. 172.

James Perry of Easton in the County of Bristol a Justice of the Peace in the last mentioned County & Reuben Taft of Uxbridge in the County of Worcester & one of the Coroners for the said County of Worcester from their respective offices & asked the advice of the Council. Advised that His Excellency issue a Warrant of Supercedeas directed to the Sheriffs of the several Counties requiring them to give orders to the said William Whiting, James Perry, & Reuben Taft in the name of the Commonwealth that they concern themselves no further in any matters relating to their respective offices —[1]

Two months later the General Court resumed its efforts to purge the courts of all who had been guilty of disloyal conduct, and on July 6, 1787, it adopted the following address:

May it Please Your Excellency. — The two branches of the General Court sensible how important it is that the characters of men appointed to superintend the execution of the laws should be pure and unsullied, and that their patriotism, their love of their Country, and inviolable attachment to the Constitution should not be subject to any just suspicion, take the liberty to make known to your Excellency, that Ephraim Fitch of Egremont, in the County of Berkshire, Esqr, & John Hurlburt of Alford, in the same County, Esquire Justices of the Peace within and for that County, have been indicted by a very respectable Grand Jury of the heinous and detestible crime of high treason, and that they, when the noble & generous exertions of freemen dispersed the forces of rebellion, fled from the justice of their country. That in the opinion of the General Court their flight could have originated only from a consciousness of guilt. But whether innocent or not the honor of government, requires that men against whom there is just foundation of suspicion should not be permitted to exercise offices of such great importance. The General Court therefore request that your Excellency would be pleased by and with the advice and consent of Council, to remove the said Ephraim Fitch and John Hurlburt from their offices aforesaid.[2]

The Council adopted an order in these cases identical in terms with that adopted in the cases of Whiting, Perry and Taft.[3]

IV. The Corrupt Justices of the Peace.

In 1794 the General Court first resorted to impeachment as a means of removing an objectionable judge. This was not the first impeachment under the Constitution of 1780, for in 1788, the House had impeached William Greenleaf, Sheriff of Worces-

[1] *Council Records*, XXX, 108.
[2] *House Journal*, July 6, 1787.
[3] *Council Records*, XXX, 232.

ter County, and the Senate had convicted him and removed him from office. The procedure followed in the Greenleaf case presents several points of interest and on some points served as a precedent — not always a happy one — in later cases. Petitions from inhabitants of the towns of Petersham and Hardwick alleged that the sheriff had been guilty of illegal conduct in the management of his office and asked the House to investigate the charges and impeach him if guilty. The House appointed a committee which granted a hearing to both parties. This committee was then discharged and the House itself then devoted an entire day to hearing the parties. The next day by a vote of 157 to 10 the House decided that sufficient evidence had been disclosed to warrant the bringing of articles of impeachment for "misconduct and maladministration in his office." The charges were embodied in six articles, the first two of which alleged generally that he had illegally detained moneys which belonged to the Commonwealth and had exhibited false accounts to the Treasurer. The other four articles were more specific. The sixth, which was typical, charged that he had procured a warrant of distress to be served on the town of Petersham for a large sum of money "which he then well knew they had long before paid." Among the five managers appointed by the House were Theophilus Parsons, afterward Chief Justice, and Fisher Ames. On June 19, 1788, the Senate issued its summons to the respondent to appear and on November 5 the trial began. It was held in Faneuil Hall and three days were occupied in the examination of witnesses and in argument. After a day spent in considering its verdict the Senate decided by a vote of 20 to 3 that the respondent was guilty. The managers for the House then moved for judgment, and three days later the Senate notified the House that it was about to pass sentence and that seats would be provided in Faneuil Hall for members of the House. The latter voted to attend, and the respondent was sentenced to removal from office. The Senate then returned to its chamber and voted that a copy of its judgment be sent to the Governor of the Commonwealth.[1]

The Journal of the House of Representatives for January

[1] A brief account of the impeachment of William Greenleaf is given in the appendix to Pickering and Gardiner, *Report of the Trial by Impeachment of James Prescott*, 212.

20, 1794, records that a letter from the Attorney General enclosing "a Representation of the Grand Jury of the County of Middlesex" was read and referred to a committee. This was apparently the initial step in a process which resulted in the first impeachment of a judge in Massachusetts. The magistrate concerned was William Hunt, a justice of the peace for the county of Middlesex. On January 27 the clerk of the House was directed to summon such witnesses as the committee desired to hear and the Attorney General was directed to attend and examine them. On February 4 the committee reported that it had heard the evidence submitted, most of which concerned the conduct of the accused only as an attorney, and that only three cases of misconduct as an officer had been made out. At the same session a petition from the accused was presented asking that he be admitted to a hearing upon the floor of the House, whereupon the House voted that the accused be admitted to such hearing by himself or counsel or both and that the complainant be heard at the same time. The Attorney General was directed to conduct the hearing on the part of the Commonwealth and the clerk was instructed to summon such witnesses as the Attorney General should require. The hearing was held on February 11 and the House voted, 113 to 36, not to investigate the charges brought against the accused as an attorney. The next day the hearing continued and the House then voted 111 to 21 that impeachment proceedings should be instituted.

On February 14 articles of impeachment were reported to the House and adopted. They were three in number and charged that the respondent had falsely recorded the appearance of two plaintiffs who had not appeared and the default of a defendant who had appeared. In consequence the House charged the respondent with "misconduct & maladministration" in his office and asked that the Senate proceed to his trial "and that if he be found guilty thereof he may by the judgment of the Hon. Senate forthwith be removed from his office of Justice of the Peace aforesaid & that such other judgment may be rendered thereon as may be agreeable to Law & the Constitution."[1]

[1] The full text of the articles of impeachment may be found in the *Journal of the House of Representatives*, February 14, 1794.

The trial, which, like that of Greenleaf, was held in Faneuil Hall, began on February 20, when the Lieutenant Governor appeared and administered the oaths. The first day was occupied in the examination of witnesses, the second in arguments of counsel. The managers were assisted by the Attorney-General, while the respondent was represented by Theophilus Parsons and Harrison Gray Otis. On the third day the Senate voted, 20 to 7, that the respondent was guilty, and four days later he was sentenced to suspension from office for one year.

On February 24, 1800, the following letter was submitted to the House of Representatives:[1]

BOSTON 24th of February 1800.

SIR

I have the honor to inclose to you, an authenticated copy of a conviction in the Supreme Judicial Court, of John Vinal Esq[r] of extortion in the office of a magistrate: and another of his conviction of Bribery and corruption in the same office. Should the government be pleased to take any measures on the Subject, these copies are necessary. I consider it to be [m]ost proper to transmit these Documents [to the] Honorable House of Representatives in the first instance, because that branch of the Legislature may proceed alone on the eighth article of the second section of the first Chapter in the Constitution, or both Branches may proceed on the first article in the third Chapter.

I have the honor to be with all respect your most obedient and most humble Servant

J A SULLIVAN
Attorney General

The honorable EDWARD H ROBINS
Speaker of the Hon[ble] House of Representatives

The House at once referred the letter of the Attorney General to a committee which made the following report the next day:[2]

The Committee, to whom was referred the communication of the Attorney General with the certificates of the Justices of the Supreme Judicial Court shewing that John Vinal Esquire one of the Justices of the Peace within & for the County of Suffolk hath been convicted before the said Court of extortion in the exercise of his office as a Justice of the Peace aforesaid, and also of bribery & corruption in his said office, having taken the same into consideration ask leave to report, that in their opinion it is the duty of the House of Representatives to prepare articles of im-

[1] Massachusetts Archives, *House Document No. 5055.*
[2] *Ibid., House Document No. 4996.*

peachment against the said John Vinal Esquire for misconduct & maladministration in his office aforesaid & to exhibit the same before the Honourable Senate to be by them heard & tried.

Feb^{y} 25. 1800 Read & accepted & Ordered that M^{r}: Williams of S — M^{r} Prescott — M^{r}: Tillinghast — M^{r} Porter & M^{r} Mitchell be a Committee to prepare articles of impeachment against the said John Vinal Esq. & report the same. —

On February 26 articles of impeachment were reported and adopted by the House. They begin by setting forth the fact that the House had received a certified record of the conviction of the accused of "extortions, bribery and corruption in his office aforesaid, whereby it is manifest that the said John Vinal, Esq., a justice of the peace as aforesaid is guilty of gross misconduct and maladministration in that office." Then follow four articles setting forth with precision the offenses with which he was charged. The first article accused him of exacting a fee of five dollars for taking bail when the legal fee was only twenty-five cents. The other three articles charged him with accepting bribes for granting liquor licenses. The trial, which was held on March 1, had hardly begun when the respondent consented to allow the record of his conviction in the Supreme Judicial Court to stand as conclusive evidence against him in support of the articles of impeachment. The Senate thereupon voted unanimously that he was guilty of all the charges brought against him and two days later gave sentence that he should be removed from office and be forever disqualified to hold any place of honor, trust or profit under this Commonwealth. In 1806 his sentence was mitigated by the General Court and he was restored to his rights of citizenship.

Cases closely resembling that of John Vinal were those of Paul Dudley Sargent and William Vinal, justices of the Court of Common Pleas and justices of the peace for Hancock County in the District of Maine. On January 15, 1803, there was laid before the House of Representatives a letter from the Solicitor General transmitting the record of the conviction of said Sargent and Vinal in the Supreme Judicial Court for receiving greater fees than were allowed by law. It was urged in mitigation that the charges against the judges "originated

in party contention and personal revenge," and in view of the fact that Sargent's overcharge amounted to only $3.33 and Vinal's to only $9, the statement is probably true. The House however took the matter seriously. At first it decided to proceed by impeachment, as it had done three years earlier in the case of John Vinal, and articles of impeachment were formulated against William Vinal.[1] But doubt was felt as to the wisdom of this course. Possibly the House thought that since the guilt of the accused had already been judicially established another trial was superfluous. At any rate the House voted on January 27 that a committee be appointed to prepare an address to the Governor, and on February 28 provision was made for a committee to present the address to the Governor. Meantime the father of William Vinal wrote the Governor requesting the acceptance of his son's resignation, while Sargent also wrote His Excellency that he found his usefulness as a judge "so much impaired as to induce me to offer my resignation." Neither resignation was accepted. The address of the General Court was laid before the Council, which advised the Governor to comply with the request contained therein and to issue his writ of supercedeas. As this writ exemplifies with unusual fulness the steps involved in removal by address, it is here reproduced *in extenso.*

Commonwealth of Massachusetts.

To all unto whom these presence shall come.....Greeting.

CALEB STRONG

Whereas upon the special trust & confidence We had reposed in Paul Dudley Sargent, of Sullivan, in our County of Hancock, & William Vinall, of Vinalhaven, in the same County, in said Commonwealth, We did assign & constitute them the said Paul Dudley Sargent & William Vinall, Justices of our Court of Common Pleas & Justices of the peace for our said County, according to the tenor of the Commissions granted them for that purpose: And whereas the two Houses of the Legislature, did, on the second of March, instant, Address His Excellency the Governor in the following manner Viz.,

[1] Massachusetts Archives, *House Document No. 5171. Journal of the House of Representatives*, January 19, 1803.

May it please Your Excellency

The two branches of the General Court sensible how important it is that the Characters of Men appointed to Superintend the execution of the Laws, should be pure & unsullied; & that their integrity, uprightness & disposition to obey the Laws should not be subject to any just suspicion, take the liberty to make known to Your Excellency, that Paul Dudley Sargent of Sullivan, in the County of Hancock, Esquire, & William Vinall, of Vinalhaven, in the same County, Esquire, Justices of the Peace within & for that County, & also Justices of the Court of Common Pleas, in & for said County have been duly convicted before the Supreme Judicial Court holden within & for said County of Hancock, for the Counties of Hancock & Washington of the Crime of wilful & corrupt extortion in their Offices of Justice of the Court of Sessions; by means of which conviction the confidence of the People must be in a great degree diminished, in the said Sargent & Vinall & the honor & dignity of the Government require, that Men, against whom such charges have been substantiated, should not be permitted to exercise Offices of such high trust & importance.

The General Court therefore request, that your Excellency would be pleased, by & with the advice & consent of Council, to remove the said Paul Dudley Sargent, & William Vinall, from their said Offices of Justices of the Court of Common Pleas, & of Justices of the Peace in & for the said County of Hancock.

Know Ye therefore, that in pursuance of the said Address of the two Houses of the Legislature, by & with the advice & consent of the Council, We have removed, & by these presents, Do wholly remove & discharge them the said Paul Dudley Sargent & William Vinall from the aforesaid Trusts, & do fully & absolutely revoke & countermand any & every Commission, constituting them Justices of the Court of Common Pleas, & Justices of the Peace as aforesaid, by us, or in our name, heretofore granted; & do declare the same to be determined annulled & made utterly void; & we command the Sheriff of the said County of Hancock, that he instantly & without delay make known to the said Paul Dudley Sargent & William Vinall, our pleasure, as hereinbefore expressed, & that he signify to them the said Paul Dudley Sargent & William Vinall that they may not henceforth presume to act, or in any way intermeddle, in what appertains to the Offices aforesaid, or to exercise any authority by virtue, or in pretence of such Commissions, but that to proceed, or attempt any thing further in that behalf they altogether forbear & surcease at their Peril. And the aforesaid Sheriff, after causing this our Writ to be registered in the Clerks Office of our Court of Common Pleas in the same County, is required to make due return of this Writ, with his doings thereon, into the Secretary's Office of our said Commonwealth, to be there recorded.

In Testimony whereof we have caused the Publick Seal of our said Commonwealth to be hereunto affixed — Witness His Excellency Caleb Strong Esq^{r} our Governor & Commander in

Chief at Boston, this 2^{d} day of March A^{o} D^{i} 1803; & in the 27th year of the Independence of the United States of America —
By His Excellency's Command —

JOHN AVERY *Secretary*

(Rec'd and Recorded the 11th day of April A. D. 1803.

Attest

WARREN HALL
Clerk of the Court of Common Pleas for the County of Hancock)

HANCOCK ss on the 29th day of March 1803 In obedience to the above command of his Excellency the Governor, I have made known to the said Paul Dudley Sargent the order of the Governor by leaving a Copy of this Precept at his usual place of abode. & on the 8th of April instant delivered a Copy of the same into the hands of said William Vinal & have caused the above petition & order to be recorded in the office of the Clerk of the Court of Common Pleas for the County of Hancock on this eleventh day of Aprill Eighteen hundred & three

THO^{S} PHILLIPS *Sheriff*

The case of Moses Copeland presents several points of interest. He was a justice of the peace for Lincoln County in the District of Maine. On January 27, 1807, charges were brought against him, and a committee was appointed to investigate them. Depositions were taken and evidence collected and counsel for the accused appeared before the committee. The report made to the House on June 15 submitted that while the conduct of the accused may have amounted to misfeasance in office it did not appear that his conduct had been so aggravated as to warrant impeachment. But the committee suggested that his usefulness as a judge may have been so impaired as to justify his removal by address. Accordingly an address was adopted and sent to the Senate, but four days later the House requested the Senate to return the address. The vote of the House by which the address had been adopted was then reconsidered and a committee was appointed to draw up articles of impeachment. These articles, which were adopted the next day, were three in number and charged that he had brought suit and entered judgment in his own court upon a promissory note owned by him, in the name of a fictitious endorsee; that he had issued writs returnable to himself and defaulted the defendant before the hour named in the writ,

although the defendant had appeared in due season; and that he had accepted a bribe of $1.50. He was acquitted of the charges in the first and third articles by a vote of 25 to 7, and of the charge in the second article by a unanimous vote.

On June 6, 1825, petitions were presented to the House of Representatives praying for the removal either by impeachment or address of Samuel Blagge, notary public and justice of the peace for Suffolk County, on the ground of official misconduct. This was referred to the Committee on the Judiciary which reported on June 11 that Blagge ought to be impeached. On June 16 the report was adopted and the Committee on the Judiciary was ordered to prepare articles. A set of fifteen articles were adopted on June 17 which were supplemented January 18, 1826, by another set of fifteen articles. In general they charged that he had made false certificates as to various appearances and declarations of Indians and negroes. On February 8, 1826, he was acquitted on all the charges. The next day a member of the House introduced a resolution providing for the "appointment of a committee to inquire into the origin of the impeachment of Samuel Blagge, Esq., & the circumstances connected with the said impeachment & report to the House such facts as in their opinion may demand the interference of this Legislature." The resolution was defeated.

In 1876 there was an epidemic of crime among the justices of the peace. One plead guilty to forgery and resigned. In three other cases the General Court presented addresses to the Governor asking for the removal of the justices named. These were Abraham Jackson of Suffolk County, a convicted forger confined in the State's Prison; Francis S. Munroe of Norfolk County who had plead guilty to an indictment for obtaining property under false pretenses and was a fugitive from justice: and Frank B. Dyer of Suffolk County, who was under indictment for forgery and was also a fugitive from justice. In none of these cases did the address assign any reason for the removal. In all of them the Governor complied with the request of the General Court.[1]

[1] See *House Document No. 321* (1876) for the case of Jackson, and *House Document No. 343* (1876) for the other cases.

V. The Removal of Justice Bradbury.

A case which attracted wide attention, both because of the high regard felt for the chief actor in it and the eminence of his position, was that of Theophilus Bradbury. After a distinguished career at the bar and a term in Congress, he had become in 1797 a member of the Supreme Judicial Court. A few years later he was stricken with palsy, and was totally incapacitated. No provision then existed whereby a judge so situated could retire upon a pension, and as Justice Bradbury was dependent upon his meager salary, he felt that he could not resign. On January 26, 1803, the House of Representatives appointed a committee "to consider the propriety of granting a salary to any of the Judges of the Supreme Judicial Court of this Commonwealth, who may be induced to resign their office by reason of age or infirmity." On February 22, this committee reported a resolve providing for the payment, not of a pension, but of a lump sum to any Justice of the Supreme Judicial Court who, on or before the first day of May ensuing, should resign his office because of infirmity. This resolve was defeated by a vote of 78 to 43. This method having failed, the House voted on June 15, 1803, that a committee should be appointed to draw up an address to the Governor asking for the removal of Justice Bradbury. On June 16, the address prepared by this committee was adopted. On June 17, Justice Bradbury addressed the following communication to the two houses:[1]

To the Honorable the Senate & House of Representatives of the Commonwealth of Massachusetts in General Court assembled, The Memorial of Theophilus Bradbury one of the Justices of the Supreme Judicial Court — Humbly Sheweth, that whereas by Reason of the Disorder under which he at present labours, he is disabled from performing the Duties of his said office, & sinsible of the importance of its being fill'd by some person capable of Executing the Duties of it, hereby signifies to the Honorable Legislature that he will resign the same, provided they will make him a grant of money, that may be Honorable on the part of Government to make, & for him to accept, as he depends principally on the Salary annexed to the office for the support of himself and family.—

Theop Bradbury

Newbury Port June 17th 1803.

[1] Massachusetts Archives, *Senate Files, No. 2934.*

This was but a renewal of the proposition which the House had rejected by a decisive vote more than three months before, and apparently no action was now taken on it. On June 21 the Senate concurred in the action of the House and voted that the following address should be presented to the Governor:[1]

MAY IT PLEASE YOUR EXCELLENCY,

The two Houses of the Legislature, having taken into consideration, the present situation of the Hon.ble Theophilus Bradbury Esq.r one of the Justices of the Supreme Judicial Court, of this Commonwealth, and upon due inquiry found, that on the 13.th day of February A D 1802, the said Judge Bradbury, has by a stroke of the palsy, been rendered unable to perform any of the duties of his office since that time, that from the nature of the attack there is no reasonable ground, to hope that he will ever be restored to such health as will enable him to perform the duties of his office, and therefore that his longer continuance therein is likely to embarrass the Judiciary of this Commonwealth. —

The two Houses while they humbly acquiesce, in the dispensations of the all wise Governor of the world, deeply regret that the Commonwealth by this visitation of heaven, has been deprived of the talents and services of a learned independant and upright Judge.—

They consider it the duty of the Legislature, from time to time, as occasion may require, to erect, and constitute Judicatories and Courts of Record, that every Citizen ought to find a certain remedy, for all injuries he may sustain by having recourse to the Laws; that it is essential to the preservation of liberty, that there should be a prompt and impartial administration of Justice, and that whenever any of the Judges thro' age or infirmity are unable to perform the high and important functions, assigned to them by the Constitution and Laws, they aught to return to private life, that their places may be filled by new appointments.

Wherefore both Houses of the Legislature request, that your Excellency with the advice and consent of the Council, would be pleased to remove the Hon. Theophilus Bradbury Esq.r from his Office of Justice of the Supreme Judicial Court of this Commonwealth. —

On June 22, when the Governor laid the address before the Council, it directed that a copy be sent to Justice Bradbury and that further consideration be deferred to July 5. The proceedings at that session of the Council are best told in the words of the Council Records:

His Excellency laid before the Council the following letter which he had received from the honorable Theophilus Bradbury one of the Justices of the Supreme Judicial Court —

[1] Massachusetts Archives, *Senate Files, No. 2934.*

Newburyport June 30th 1803.

Sir:

I have received from the Secretary a copy of an address from both Houses of the Legislature to your Excellency to remove from me my Office of a Judge of the Supreme Judicial Court; also an official communication of the order passed by the honorable Council, that they had assigned the fifth of July next to consider of the address which your Excellency laid before them for their advice. For this notice I return my thanks.

The disorder I am visited with renders me at present unable to discharge my duty — I consider an estate in the office I hold during good behaviour as by Law an estate for life to be forfeited only by misbehaviour. — in the address the Legislature fully acknowledge my good behaviour to my entire satisfaction, and assign the act of Divine Providence as the whole reason for the address for my removal; this being the case, I do not think it my duty, as I stated in a memorial to the General Court in Justice to myself and family to resign the office, and thereby, by an act of my own to part with the salary on which I principally depend for my support and that of my family — but had the legislature thought proper to have made any reasonable provision for my support, I should have readily resigned in order that the public might not suffer for want of a suitable person to execute the duty of that office. I have conversed with my friend Mr Parsons who will more fully inform your Excellency of my sentiments on this subject. I am with respect, Your Excellency's obed servant

Theops Bradbury.

His Excellency Governor Strong.

Judge Bradbury being unable to attend on account of sickness, the Council Advised, That agreeably to his request Theophilus Parsons Esq.r be admitted, and heard in support of the objections suggested in Judge Bradbury's letter against his being removed from office — he was accordingly admitted and heard, after which the consideration of the subject was postponed till 4 oClock P.M.

Agreeable to assignment the Council took the subject of the address of the two branches of the Legislature for the removal of the hon Theophilus Bradbury from the Office of Justice of the Supreme Judicial Court into consideration, and after debate thereupon, Advised that His Excellency issue a Writ of Supercedeas in due form for the removal of the said Theophilus Bradbury Esqr.[1]

VI. The Impeachment of Judge Prescott.

On January 20, 1821, there was presented to the House of Representatives of Massachusetts a petition from Sampson Woods, a resident of Middlesex County, in which it was charged that James Prescott, Judge of Probate for the County of Middlesex, had been guilty of extortion and that "the

[1] *Council Records*, XXXIV, 71, 72.

ordinary fees paid for the settlement of estates in the Probate office in this county, are more than twice the sums allowed by law." The petition was referred to a committee which reported the following resolution:

Resolved, That it is the duty of this House, as the grand inquest of the people of this Commonwealth to cause James Prescott Esq. Judge of Probate for the County of Middlesex, to be impeached of misconduct and maladministration in his said office, as disclosed in the evidence submitted to this House.

Resolved, That this House do proceed to impeach the said James Prescott Esq. of misconduct and maladministration in his said office, at the Bar of the Honorable Senate of this Commonwealth.

This resolution was adopted by the House on February 2 and reported to the Senate the same day. The Senate therefore ordered its secretary to issue a summons to Judge Prescott to appear at the bar of the Senate on February 6, to answer the charges which would then be exhibited against him by the House of Representatives. The Senate also appointed a committee to prepare proper rules of procedure. The House appointed a committee of five to prepare articles of impeachments. When it reported, the House voted that the committee, with two additional members, serve as managers on the part of the House to conduct the impeachment. One of the two new members was Lemuel Shaw.

The charges against Judge Prescott were embodied in fifteen articles. The third article, one of the two upon which the accused was found guilty, is fairly typical of all of them except the twelfth, and was as follows:

Art. III. That the said James Prescott, Esq. has been guilty of misconduct and mal-administration in his said office, herein to wit:

That said James Prescott, Esq. Judge as aforesaid, on the second day of Aug. A. D. 1819, at his said office, in Groton, aforesaid, and not at any Probate Court held according to law, did decree and grant Letters of Administration upon the estate of one Eri Rogers, to one Benjamin Dix, Esq. and thereupon did issue a warrant to appraise said estate; and the said Prescott did, then and there, wilfully and corruptly, demand and receive, of said Administrator, as and for the fees of his said office, in the business aforesaid, other and greater fees than are by law allowed therefor, to wit: the sum of five dollars and seventy cents. And that the said Prescott, on the nineteenth day of August, at his said office, in Groton

aforesaid, and not at any Probate Court held according to law, did receive the said administrator's return of the inventory of said Estate, and, then and there, did decree and grant a Commission of Insolvency, upon the estate aforesaid; and the said Prescott did, then and there, wilfully and corruptly receive from said Dix, other and greater fees than are by law allowed, for the business aforesaid, to wit: the sum of thirty nine dollars and two cents.

The twelfth article set forth an offense different in nature from those charged in the other fourteen articles, and far more serious. It alleged that when a guardian appeared before Judge Prescott to present his account, the Judge overheard a controversy between the guardian and an overseer of the poor concerning the property of the ward; that he thereupon tendered his professional advice on the matter and made a charge of five dollars therefor; that the overseer refused to pay the charge on the ground that the advice given was in the line of the Judge's official duty; that Judge Prescott then demanded the sum from the guardian and obtained it by stating that the overseer need know nothing about it, and by promising to insert the amount in the guardian's account which had already been allowed in the form consented to by the overseer; and that the Judge thereupon inserted the charge in the guardian's account by interlineation, and allowed the account.

At the time appointed the accused appeared at the bar of the Senate, the charges were read to him, and he entered a plea of not guilty. Through his counsel, Samuel Hoar, Jr., he then stated that the transactions set forth in the articles covered a period of sixteen years, and that it would require some time to procure evidence and investigate the law. He therefore asked that the case be continued until the following session of the General Court. The Senate denied this request, but it finally voted that the respondent should make answer ten days before the eighteenth of April, on which day the Court of Impeachment would reassemble.

At the time appointed the respondent appeared attended by his counsel, among whom were now numbered Daniel Webster, William Prescott, George Blake and Augustus Peabody. After the formalities attending the opening of the court, Daniel Webster as counsel for the respondent read an elaborate answer

to the charges which had been preferred. The answer, when read to-day, makes a favorable impression. Each of the fifteen articles was carefully examined, and the facts set forth in them were analyzed and put in a favorable light. Attention was again drawn to the fact that the charges covered a period of nearly sixteen years and the respondent asked indulgence if lapse of time made it impossible to furnish detailed information as to all the transactions involved. At a later time his counsel pointed out that the overcharges which it was alleged he had made amounted in a period of almost sixteen years to about forty-five dollars. This circumstance of course does not excuse the respondent, but the smallness of the amount involved was perhaps in inverse ratio to the strength of the personal animus of those who brought the matter to the attention of the House and pressed for action.

Later in the day the managers made replication to the respondent's answer, and opened the prosecution. The introduction of testimony then began and occupied the next two days. The arguments began on Saturday, April 21, and continued, with the exception of Sunday, until Thursday, April 26. When the court assembled on Friday, April 27, the members proceeded to vote as to the guilt of the accused on the charges brought in each of the fifteen articles. This process, which involved a roll call on each article, occupied more than two hours, and resulted in acquittal on all the articles except the third, where there was conviction by a vote of 16 to 9, and the twelfth, when the accused was pronounced guilty by a vote of 19 to 6. In the afternoon the managers demanded judgment, and after some rather futile remarks by Daniel Webster as to the novelty of the court's procedure, judgment was given in the following terms:

The Court for the trial of impeachment having found James Prescott guilty of misconduct and mal-administration in the office of Judge of Probate of wills and for granting letters of administration within and for the county of Middlesex, charged upon him in the third article and twelfth article of impeachment as charged against him by the House of Representatives — It is considered by the Court, that the said James Prescott be removed from the office of Judge as aforesaid, for the county aforesaid, and he is removed accordingly.

VII. The Removal of Judge Loring.

By far the most notable example of the removal of a judge by legislative address which has ever occurred in Massachusetts or indeed in any part of the United States is that of Judge Loring. Without regard to the merits of this particular case it may be said that it shows on the one hand how a judge may be punished for the conscientious performance of a duty which had no connection with the office from which he was removed, and on the other how the State may rid itself of an official who while blameless in his office had nevertheless lost the confidence of the people to such an extent that his continuance therein was offensive to them. The Loring case is a part of the history of the long contest between freedom and slavery, — a contest in which men's judgment and action were determined less by rules of law than by moral considerations. The situation which produced it has passed away, and we are now so removed from it and from the passions then dominant that it is possible to examine the law and the facts in a spirit of detachment that should be just to all concerned.

Edward Greely Loring belonged to a family which was distinguished both then and now for the legal attainments of various of its members. He was born in Boston, January 28, 1802, and graduated from Harvard in 1821. In 1836, 1837 and 1838 he was a member of the House of Representatives of Massachusetts. In 1839 he was appointed a Commissioner of the United States for taking bail and affidavits, and after the enactment of the Compromise of 1850 he was also charged as such Commissioner with the enforcement of the fugitive slave clauses of that act. In 1847 Governor Briggs made him Judge of the Probate Court for Suffolk County. In 1854, shortly before taking the action which was to lead to his removal from the Massachusetts bench, Judge Loring had been appointed by the Corporation of Harvard College to be a lecturer in the Law School and he entered at once upon his academic duties although his appointment was still subject to the confirmation of the Board of Overseers.

Some time in March, 1854, there appeared in Boston a young negro, Anthony Burns by name, who had been held in

slavery in Virginia and who had fled to Boston by boat, and was employed in a clothing house kept by a negro in Brattle Street. At the close of business on May 24, 1854, while going home for the day, Burns was arrested at the corner of Court and Hanover streets on a warrant issued by Judge Loring acting as United States Commissioner. Burns was informed that the theft of some jewelry was the reason for his arrest, and every effort was made to preserve secrecy lest the news that an attempt was being made to return a fugitive to slavery should create a public commotion. In some way, however, knowledge of what had occurred got abroad, and when Burns was brought before Commissioner Loring in the United States court room the next morning, the eminent jurist, Richard Henry Dana, was present and offered his services to Burns as counsel. Burns seemed so terrified as to be unable to make a decision, but under the questioning of Commissioner Loring, whose attitude, according to Dana, was kindly and sympathetic, Burns finally said that he would like to have counsel, and the hearing was then postponed for two days, that is until Saturday, May 27, at which time it was again postponed until Monday, May 29.

Meantime the anti-slavery leaders called a meeting in Faneuil Hall Friday evening, May 26. In the light of after events the concluding sentence of the call acquires ominous significance, — "Shall he be plunged into the hell of Virginia slavery by a Massachusetts Judge of Probate?" At the meeting resolutions were read by Samuel Gridley Howe, and fiery speeches were made by Wendell Phillips and Theodore Parker. After the meeting a mob led by Thomas Wentworth Higginson, then a young minister in charge of a Unitarian parish in Worcester, attacked the court house where Burns was confined and attempted to rescue him. The attack failed, a member of the mob was killed, and Colonel Higginson received a cut on the chin, the scar of which remained throughout his life. Judge Loring himself received numerous letters, anonymous and otherwise, threatening his life if he should attempt to conduct a hearing. He declined, however, the proffered protection of the police and the military and went about the streets in his usual manner.

It was in such an atmosphere that Judge Loring had to make a decision upon the application for the surrender of Burns to his slave master from Virginia. When the hearing began the court house was surrounded by an excited crowd, while the building itself was occupied and guarded by soldiers. The evidence for the claimant was brief. A Virginian who had hired Burns from his owner for three years identified him and testified that he had seen Burns in Virginia as late as March 20, 1854. The record of a Virginia court was offered as evidence of the fact that Burns was a slave who owed service or labor to the claimant. The admissions of Burns when he was first confronted by the claimant after his arrest were also offered, and were received over the protest of Dana. For Burns an attempt was made to cast doubt upon his identity by evidence that he had been in Boston since March 1, while the claimant had attempted to prove that he had been in Virginia as late as March 20. It was also sought to show that Burns had had no intention of running away from Virginia, but had gone to sleep upon the vessel where he was employed and had been carried away involuntarily. It was argued that this did not constitute an "escape." It was further contended that since the claimant had hired Burns to another person for a term of years, whatever service was due from Burns was due to the lessee and not to the claimant.

The examination of witnesses and argument of counsel occupied the whole of May 29, and the court was then adjourned until Friday, June 2, when Judge Loring announced his decision. He discussed at considerable length the constitutionality of the Act of 1850, which, however, could hardly be regarded as an open question in Massachusetts, since the Supreme Judicial Court by a unanimous opinion had held it to be valid. He then continued:

> I think the statute constitutional, and it remains for me now to apply it to the facts of the case. The facts to be proved by the claimant are three:
>
> First, That Anthony Burns owed him service in Virginia. Second, That Anthony Burns escaped from that service. These facts he has proved by the record which the statute, section tenth, declares "shall be held and taken to be full and *conclusive* evidence of the fact of escape, and that the service or labor of the person escaping is due to the party

in such record mentioned." Thus these two facts are removed entirely and absolutely from my jurisdiction, and I am entirely and absolutely precluded from applying evidence to them. If, therefore, there is in the case evidence capable of such application, I cannot make it.

The third fact is, the identity of the party before me with the Anthony Burns mentioned in the record.

This identity is the only question I have a right to consider.

On the question of the identity of Burns the witnesses of the claimant and of the respondent were in direct conflict. Judge Loring determined the matter by a reference to the language used by Burns in his conversation with the claimant after his arrest. Objection had been made to the admission of this evidence on the ground that it compelled the respondent to bear testimony against himself, but Judge Loring overruled the objection and said:

I think that the word "testimony," in the law, must be regarded as referring to evidence given by a witness, and not to confessions or admissions; but I am unwilling to prejudice the liberty of the prisoner, and his counsel may have the right to pass that question for the present.

As the objection was purely technical, and as there was no real doubt as to the identity of the respondent, it cannot be said that Judge Loring's admission of Burns' conversation with the claimant and his use of this evidence as a means of identifying the respondent worked any injustice. Being satisfied that the respondent was the slave mentioned in the record, Judge Loring conceived that he had no alternative but to issue the certificate which the claimant was asking for. This he did on June 2, and in the afternoon of the same day, Burns, guarded by detachments of United States Artillery and of United States Marines, and surrounded by an armed posse raised by the United States Marshal, was taken through crowded streets from the court house to a wharf where he was placed upon a steamer which carried him down the harbor, where he was transferred to a United States revenue cutter and returned to Virginia.

The decision of Judge Loring aroused a storm of indignation which was not in the least mitigated by the fact that it was strictly in accordance with the law. When the General Court

assembled in the following winter, petitions for his removal from the office of Probate Judge began to pour in from every quarter of the State. It was not alleged that he was not competent to perform the duties of that office or that he had committed any wrongful act in connection with it. His offense, in whatever it might consist, had been committed in the office of United States Commissioner, but in that capacity he was beyond the control of the people of Massachusetts. Some of the petitioners frankly stated that Judge Loring ought to be removed on account of his decision in the Burns case, which was offensive to the moral sentiments of the people of the State, however much it might be in conformity with the law. Other petitioners asked for removal on the ground that the offices of United States Commissioner and Judge of a Probate Court of Massachusetts were incompatible and should never be held by the same person. Others gave no reason at all for their request for the judge's removal. However the matter might be disguised, the decision in the Burns case was the real reason for the petitioners' action.

Before any result had been reached in the General Court, the Overseers of Harvard College, influenced by the dominant sentiment of the community, made Judge Loring feel their displeasure by refusing to confirm his appointment as a lecturer in the Harvard Law School. Among the Overseers who voted against him were Ex-Governor Briggs, who, nine years before, had appointed him to the seat upon the bench from which he was about to be deposed, and Governor Gardner, who was twice to refuse the petition of the General Court for his removal.

The petitions for the removal of Judge Loring were referred to the Joint Committee on Federal Relations, whose hearings, on account of the large crowds in attendance, were held in the hall of the House of Representatives. To this Committee Judge Loring himself addressed a remonstrance, which concluded as follows:

> When I was appointed Judge of Probate, I was, by the authority of the people of Massachusetts, bound by an official oath to support the constitution of the United States. This is to be done only by fulfilling the provisions of the constitution, and of those laws of the United States

which are constitutionally made to carry the constitution into effect; and on the authority of the Supreme Judicial Court of Massachusetts, I confidently claim that, in my action under the U. S. Act of 1850, I exactly complied with the official oath imposed on me by the authority of the people of Massachusetts. . . .

And I respectfully submit to your honorable bodies, that when the petitioners ask you to punish a judicial officer for an act not prohibited by any statute of Massachusetts, but lawful under those statutes, and imposed by that law of the land which is the law of Massachusetts, they ask of you an abuse of power for which the legislative history of Massachusetts furnishes no precedent.[1]

Even at the present day, when the passions which dominated the community when the Loring case was heard have entirely died away, it is difficult to form a consistent judgment as to Judge Loring's conduct in the matter and determine to what extent the Governor and the General Court were justified in removing him. The case presented a sharp conflict between ethics and positive law. Those who had no official obligation in the matter could disregard the law and do what their conception of duty required of them. Such persons could assert that no man was justified in assisting to bring about the return of a human being to slavery, no matter what the law might require. If an officer argued that his official position made such a decision imperative, the answer was that he should not allow himself to remain in such an office. This was the view taken by the other two United States Commissioners in Boston, both of whom resigned rather than enforce the fugitive slave law. Some of Judge Loring's closest relatives advised him to do likewise, but he regarded such an evasion of official duty as cowardly and refused to acquiesce. Richard Henry Dana would even change the rules of evidence in such a case, and wished to have "the principle laid down that no man can admit himself a slave in Massachusetts". On the other hand, the conduct of Judge Loring, regarded from the standpoint of positive law, seems to have been without blame. Even Mr. Dana, who was Burns' counsel, said to the investigating committee, "I do not think that there was any element of what we have a right to call misconduct in the discharge of his function." And again Mr. Dana said, "If a man is willing

[1] *House Document No. 63*, (1855), pp. 4 and 5.

to execute the law and be an instrument of sending a man back into slavery under such a law, he could not act better in his office than Judge Loring."

Such being the situation in which Judge Loring was involved, can it be said that a case justifying his removal by address was presented? The Committee which heard the evidence summarized the argument against Judge Loring under the following four heads:

1. *Facts showing Official Incapacity.*

The Committee called attention to the Massachusetts statute of 1843 by which the magistrates of Massachusetts were forbidden to act in cases involving the seizure of slaves under the act of Congress of 1793, and said that while technically Judge Loring was not within the statute, since his decision in the Burns case was made as a Federal Commissioner and not as a State magistrate, yet morally he had contravened the spirit of the act. The Committee also cited the statute requiring a session of the Probate Court to be held in Boston at the very hours at which Judge Loring was hearing the Burns case.

2. *Acts affecting his Judicial Weight in the Public Judgment.*

Under this head the Committee charged that Judge Loring had acted against the weight of the evidence on the question of the identification of Burns, and that he was wrong in admitting the evidence of Burns' conversation with his master.

3. *Acting on what came to his Knowledge Extrajudicially, or putting himself in the Way of being Influenced Extrajudicially, as by drawing a Bill of Sale of the Man on Trial before him.*

After the arrest of Burns and prior to the hearing, some of his friends in Boston tried to raise sufficient money to purchase him from his master. This was known to Judge Loring, who, in anticipation of the success of the effort, drew a bill of sale by which the transaction could be consummated. It was also shown that before the hearing Judge Loring had said to Wendell

Phillips, "Mr. Phillips, I think the case is so clear that you would not be justified to place any obstacles to this man's going back, as he probably will."

4. *Allowing the Trial to be held and conducted with Soldiers, so as to outrage the Sense of the People.*

In commenting upon the presence of soldiers at the hearing, the Committee chose to disregard the fact that the court house was surrounded by a mob, and to treat the soldiers as a means of intimidating the prisoner. They said:

> Shall the poor trembling suppliant for the God-given boon of freedom plead on the soil of Massachusetts under the terror of dirks and pistols?

The Committee labored long and arduously to build up a technical case against Judge Loring, and the result was not convincing. But in a single sentence of three lines it stated the principle which was really the basis of its recommendation to the General Court to adopt an address to the Governor asking for his removal. The Committee said:

> Reasons of state, therefore, demand that every officer who, through incapacity, or heedlessness, or bias, or moral taint, or any cause, has lost the confidence of the people, should be removed.

Two members of the Committee declined to sign the report although they admitted the right of the General Court, for the reasons therein set forth, to recommend the removal of Judge Loring. They said:

> They have no ordinary solicitude in reference to the effect upon the independence of the judiciary of this summary punishment of a judge, who, however mistaken, is believed to have been conscientious, and who is now adjudged, not by the sentiment that existed at the time of the act, but by the opinion that has grown up into vigorous life under the excitement of national events which have urged and exasperated public feeling since the decision was made.[1]

Another member filed a minority report in which he stated that the validity of the Fugitive Slave Act was not denied and hence it was binding, not only upon Federal officials but upon

[1] *House Document No. 93* (1855), p. 38.

every citizen of the Union. He also argued that the legislative power of removal should be exercised only in a case of "clear, unquestionable, self-evident deficiency or incompatibility, either physical, moral or intellectual. To adopt a different rule would be at once to place the independence of the Judiciary at the mercy of temporary caprice, excitement or partisanship." He also raised the question as to how far the State is justified in attempting to prevent the enforcement of a valid enactment of Congress. He said:

> Our proud old Commonwealth would but tarnish her escutcheon, by attempting to reach indirectly, what, it might perhaps be argued, she dares not to do openly and manfully — in taking a step like this, either for the purpose of defining her position or satisfying her conscience. If Massachusetts is prepared to deny or resist the authority of the Union, let her do so in her sovereign capacity, and there may be honor, if not wisdom, in the attempt. To shift a responsibility, so delicate and so grave, upon the shoulders of one of her citizens, is neither magnanimous nor just. She should not require of a feeble individual to solve a trying question, and to meet a risk from which she herself has shrunk, as yet, in painful reluctance.[1]

The report of the Committee concluded with a recommendation that the General Court adopt an address to the Governor requesting the removal of Judge Loring. By a vote of 206 to 111 in the House and of 27 to 11 in the Senate the report of the Committee was accepted.

The motive which actuated the Joint Committee and probably the General Court itself was well stated in the following paragraph of a letter from a member of the Committee to Richard Henry Dana:

> The Committee have no opposition to Judge Loring as an individual. Their object is simply to prevent, in future, as far as possible, the extradition of alleged fugitive slaves from the soil of Massachusetts, and particularly that it shall never be done in disregard of the right of trial by jury, and of the privileges secured by the writs of habeas corpus and personal replevin. They believe that this object can be more thoroughly accomplished by the removal of Judge Loring than by pursuing any other course.[2]

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[1] *House Document No. 93* (1855), pp. 42, 43.
[2] *House Document No. 205* (1855).

The address of the General Court asking for the removal of Judge Loring was as brief as it could well have been made. It was a bare request for his removal without any intimation of the reasons lying back of the request.[1] In his message declining to comply with the request, Governor Gardner commented upon this omission, and said:

> If it be the meaning of this proviso [in the Constitution] that judicial officers may be removed, without cause on address of the two houses, all sections of the Constitution referring to impeachment of judges are superfluous. Why provide for impeachment and trial by the two branches, under the solemn forms prescribed, if an address from those two branches, without confronting the culprit with his accusers, without even an alleged culprit, or any accusers, or any crime, may justify a judicial removal?

Since the address assigned no reason for removing Judge Loring, Governor Gardner went outside the record and considered the reasons that were commonly given for this measure. No charge had been made, he said, that Judge Loring's conduct in his office of Judge of Probate had not been entirely satisfactory. To remove him under such circumstances would place the judiciary in the same category with postmasters and sheriffs who are subject to change with each change of ruling party. Nor was it alleged that Judge Loring had committed any offense against the laws of either Massachusetts or the United States. But it was charged that Judge Loring's conduct, while not criminal, was offensive to the people of the State. As to this Governor Gardner said:

> To the allegation that Judge Loring has shocked the popular sentiment of Massachusetts, it may be pertinent to ask what the duty of judges is. Are they to expound the laws as made by the law-making power; or are they to construe them in accordance with popular senti-

[1] The following extracts from the Council Records indicate the procedure of the Governor and Council when the address was received:

"THURSDAY, May 3d, 1855.

"Address for removal of Judge Loring from office, received from Commee of Leg.e by the Governor, in presence of the Council."

"THURSDAY, May 10th, 1855.

"The Governor communicates to the Council that he has this day returned to the House of Representatives, the Address of both Houses, submitted to him on the 3d instant, for the removal of Edward Greely Loring from the office of Judge of Probate for the County of Suffolk with his reasons for declining to accede to their request."

ment? When the time arrives that a judge so violates his oath of office as to shape his decisions according to the fluctuations of popular feeling, we become a government, not of laws, but of men.[1]

For these reasons Governor Gardner declined to comply with the request contained in the address of the General Court.

A few days later the General Court passed a bill entitled "An Act to protect the Rights and Liberties of the People of the Commonwealth of Massachusetts", — popularly known as the Personal Liberty Bill. This measure was part of the campaign against Judge Loring as is evident from the following provision:

SECT. 14. Any person holding any judicial office under the Constitution or laws of this Commonwealth, who shall continue, for ten days after the passage of this act, to hold the office of United States Commissioner, or any office under the laws of the United States which qualifies him to issue any warrant or other process, or grant any certificate under the acts of Congress named in the ninth section of this act, shall be deemed to have violated good behavior, to have given reason for loss of public confidence, and furnished sufficient ground either for impeachment or for removal by address.[2]

When this bill was sent to Governor Gardner for his approval, he asked the Attorney-General and the Justices of the Supreme Judicial Court for their opinion as to its constitutionality, particularly of the clause above cited. The Attorney-General pronounced it "beyond the constitutional competence of the Legislature", while the Justices in a unanimous opinion declared another section of the bill to be in violation of the Federal Constitution.[3] In consequence of this advice, Governor Gardner vetoed the bill, but in spite of the fact that the Governor, the Attorney-General and all the Justices of the Supreme Judicial Court regarded it as unconstitutional, the two houses passed the act over the Governor's veto May 21, 1855.

The failure in 1855 to effect the removal of Judge Loring led to a temporary cessation of the movement against him, and the

[1] *House Document No. 302* (1855), p. 10.

[2] *Acts and Resolves of 1855*, ch. 489.

[3] A diligent search in all probable places has failed to discover any copy of this Opinion of the Justices. Any person knowing of a copy will confer a favor by communicating with the State Librarian of Massachusetts, State House, Boston.

journals of the House and the Senate for 1856 contain no reference to the subject. In 1857, however, the agitation was renewed and numerous petitions were received. But it is of interest to note that in the hearings before the Joint Committee on Federal Laws, to which the petitions were referred, the petitioners confined their argument to the one point that Judge Loring's continuance in office was in violation of the statute of 1855, and this was the only point which was considered by the Committee in drawing up its report.

The majority of the Committee point out that in view of the ground upon which the petitioners ask for Judge Loring's removal, the question to be determined becomes of interest to every judge or justice of the peace in Massachusetts who may hold an appointment as United States Commissioner, since the statute of 1855 affects all such magistrates alike. They, therefore, enter into an examination of the power of the General Court to enact such a statute and arrive at the result which had been reached by Governor Gardner and the Attorney-General and the Justices of the Supreme Judicial Court in 1855. But, on the other hand, they do not question the power and the right of the General Court to vote an address for the removal of Judge Loring even though the statute in question be invalid. They therefore recommended that the petitioners have leave to withdraw.

Two members of the Committee drew up a long minority report, in which they attempted to establish the validity of the statute of 1855. They also submitted a form of an address to the Governor in which eight grounds for the removal of Judge Loring were stated, seven of which had to do with his relation to the Burns case, while only the eighth referred to the one point which was argued before the Committee. When the majority and minority reports were submitted to the Senate that body, by a vote of 20 to 15, substituted the minority report for the majority report, and, by a vote of 25 to 12, adopted an address to the Governor. The House concurred in this action by a vote of 210 to 69. This address, unlike that of 1855, stated the reasons for the removal of Judge Loring, and asked the Governor to take this action either because Judge Loring as a Federal magistrate had assisted in returning

a human being to slavery or because he was holding two offices which the statute of 1855 declared to be incompatible. The action of the General Court was taken so near to the end of the session that Governor Gardner was unable to submit to that body before its adjournment a statement of his reasons for refusing to comply with its request; but he prepared such a statement and placed it on record after the termination of the session.[1] In it he referred to his message of 1855 for the reasons which led him to believe that procedure by address was not the proper mode of removing an officer for an alleged infringement of a statute of the Commonwealth. He then stated again the grounds for believing that the act of 1855 was unconstitutional, and therefore declined to comply with the wishes of the General Court. He concluded by saying:

> I regret that this question has assumed a party aspect, instead of being considered as a matter immediately affecting the permanency of our judiciary, and the rights and interests of the people of our Commonwealth. Yet the actions of party leaders, the unmistakable speeches of partisan orators, and the tone of a portion of the political press, conclusively indicate that the question is now to be taken from the halls of legislation and from executive action to be adjudicated by the votes of our citizens at the ensuing State election.

In 1858 Governor Gardner was succeeded by Nathaniel P. Banks, Jr., and the opponents of Judge Loring felt encouraged to make another attempt to effect his removal. Petitions were again sent to the General Court, and the Committee to which they were referred made a report in which the facts were briefly recited and the removal of Judge Loring was recommended on the ground that the two offices which he was holding were incompatible. The fact that Judge Loring had adjourned the Court of Probate in order to hold the hearing in the Burns case was cited as evidence of such incompatibility. As to the act of 1855 which Governor Gardner had vetoed the Committee said:

> They do not feel obliged to base the grounds for his removal upon the law of 1855, and, indeed, to establish the entire validity of those grounds, in their opinion, it is not necessary to regard that law, except so far as it is declaratory of the sentiments of the people. If that law is constitutional, it is sufficient to say that its violation is a valid reason for the

[1] *Acts and Resolves of the General Court for 1856–7*, 766.

address. If it is unconstitutional, they hold that the principle so long acknowledged, which dictated its enactment, is also abundant cause and justification.[1]

The report of the Committee was accepted by a vote of 127 to 101 in the House and of 24 to 14 in the Senate.

The day after the address of the General Court was presented to him, Governor Banks replied that he had removed Judge Loring from his office of Judge of Probate. The promptness with which so long a message was transmitted to the General Court suggests that it was prepared in advance of the receipt of the address to which it was a reply. In his message Governor Banks said:

> The power given to the executive department of the government, upon address of both houses of the legislature for the removal of notaries public, officers commissioned to command in the militia, and all judicial officers, is a power given without qualification, and its exercise is intrusted solely to the discretion of the legislative and executive branches of the government. But inasmuch as other constitutional modes of procedure have been established, to which recourse may be had, in cases of misconduct or maladministration in office, and which admit of more extended opportunities of justification and defence, I am led to the conclusion that the legislature has had regard, in this case, to the incompatibility of offices held by the judge of probate for the county of Suffolk, whose removal from office is requested.

Governor Banks then stated that he complied with the recommendations of the two houses solely because the two offices held by Judge Loring had been delared incompatible by the statute which had been passed in 1855 over the veto of Governor Gardner, but having made this announcement he criticised at considerable length various sections of that statute and recommended their modification. Late in life Governor Banks told a friend that the one act of his official career which he most regretted was his yielding to the General Court on this occasion.

Thus, almost four years after his offense was committed, Judge Loring was removed from the Court of Probate.[2] Time,

[1] *House Document No. 107* (1858), pp. 4, 5.

[2] Almost immediately after his removal from office in Massachusetts, Judge Loring was appointed a Justice of the United States Court of Claims, where he served from May 19, 1858, to December 10, 1877. He died in Winthrop, Massachusetts, June 19, 1890.

which softens many offenses, had but aggravated the resentment aroused by the part which he had taken in the trial of Anthony Burns. Indeed, the case was no longer one which concerned Massachusetts alone. The irrepressible conflict was drawing near. The Dred Scott decision had placed many courts under suspicion, and Judge Loring was caught in the current which was sweeping on to civil war.

VIII. The Removal of Judge Day.

Early in 1881 petitions bearing about one thousand signatures were presented to the General Court asking for the removal of Joseph M. Day from the office of Judge of Probate and Insolvency for the County of Barnstable. Almost simultaneously numerous remonstrances against such action were presented. It was evident that the case had been before the public for a sufficient length of time to allow opinion to crystallize. The fact that the petitions for the removal of the judge and the remonstrances against his removal were drawn up on printed forms is also significant. The charges against Judge Day were set forth as follows in one of the petitions for his removal:

> He has been retained and has acted as counsel in suits and matters which depended upon and related to orders and decrees passed by him as such judge;
>
> He has been and is now retained, and has acted and is now acting as counsel for and against executors and administrators appointed by him within his jurisdiction in suits brought by and against said executors and administrators as such;
>
> He has acted as judge in cases where the party whose interests were adjudicated by him was his client in another court, and made decrees for the purpose and with the effect of obstructing the course of justice in the case where he was counsel; and
>
> He has habitually treated with rudeness the parties doing business in his court. And your petitioners also represent that the general character of the said Joseph M. Day is such as to render him unfit for the duties of said office.

These petitions were presented first to the Senate, which referred them to the House for joint action, but the House declined to concur until it had first been determined that the

case was one for removal by address and not by impeachment, for an impeachment is within the sole jurisdiction of the House. The committee of the House to which the question was referred reported that "the subject-matter is not one where the House of Representatives need necessarily originate proceedings."[1]

The petitions and remonstrances were then referred to a joint special committee of which Senator Marcus P. Knowlton, afterward Chief Justice of the Supreme Judicial Court, was made chairman. Hearings were begun at once and the committee voted that Judge Day be allowed "to appear before them in person and by counsel, in the hearing of the case, to cross-examine witnesses called by the petitioners, and to produce testimony in his own behalf." Both parties were represented by counsel, among whom was Ex-Governor Boutwell, who appeared for the petitioners. The hearings thus took on the nature of a judicial proceeding.

At the very beginning the question which had already been raised in the House was presented as to whether the nature of the charges made the case one for impeachment or for procedure by address. Counsel for the respondent argued that the first three charges were matter for impeachment and only for impeachment, and asked the committee so to decide. Ex-Governor Boutwell argued that the very fact that the charges had been referred to a joint committee indicated the judgment of the Senate and the House that the case was one which may be pursued by address, or else that the processes of impeachment and address are co-existent processes under the Constitution, either of which may be chosen by the General Court.

The committee held seventeen hearings, fourteen of which were devoted to the opening statements and the taking of testimony, while the last three were given over to arguments. It then reported its unanimous conclusion that the petitioners should have leave to withdraw. One member of the committee recorded in a separate report that while concurring in the opinion of his colleagues he did not wish it to be understood that he approved of the acts of Judge Day. Three other members, including the chairman, prepared an opinion of considerable length, in which they set forth their reasons for their

[1] *House Document No. 165* (1881); *Senate Document No. 200* (1881), 13.

conclusion. This opinion is a valuable contribution to the literature of the subject of removal by address. The House refused to adopt the recommendation of the committee, and on May 11, 1882, by a vote of 120 to 70, it substituted an address to the Governor asking for Judge Day's removal. On May 13, the Senate by a vote of 23 to 14 refused to concur, and Judge Day therefore remained in office.

The campaign against Judge Day was renewed in 1882. Petitions were filed calling for his removal, but unlike those of the previous year they assigned no reasons for such removal. Remonstrances were also filed, and both were referred to a joint special committee of the House and Senate. None of the members who had served on the joint special committee of 1881 were reappointed. Only the petitioners and the remonstrants were represented by counsel. Although Judge Day was not represented, he was himself present at the hearings. The procedure followed was essentially the same as that of the preceding year, and in the argument, also, counsel for the remonstrants devoted their opening statement to an attempt to demonstrate that as this was a case for impeachment the committee could have no jurisdiction. They also made the novel suggestion that this was a "solemn occasion" involving an "important question of law," and hence that it was the duty of the General Court to submit the question of jurisdiction to the justices of the Supreme Judicial Court. As the questions of fact were largely the same as those passed upon in 1881, the committee ruled that any of the printed testimony of that year might by consent of parties be introduced, and much of it was so introduced. Twenty-one hearings were held, the last six of which were devoted to arguments.

The committee was divided in opinion as to the result of its investigation. Four members felt that the facts proved did not justify removal from office, especially since many of the transactions upon which the charges were based occurred from ten to twenty years previously and hence had no bearing upon Judge Day's present fitness to hold office. The remaining seven members of the committee were convinced that the charges made in 1881, as set forth in the petition already quoted, had been substantiated, but that the specific charge

of habitual drunkenness had not been proved. Another charge which was not made against him in 1881 was held to have been proved and the judge's conduct as set forth in that charge was severely condemned. It was based upon the following series of transactions. Judge Day was appointed Judge of Probate in 1858. In 1861 he was appointed Collector of Customs at the Port of Barnstable, and he then sent to Governor Andrew his resignation as Judge of Probate. Through a misunderstanding his resignation did not become effective and he withdrew it. Meantime as Collector he had appointed a number of subordinate officials from whom he had exacted contributions ranging from $35 to $100 in recognition of the favor which he had shown them. The sum total thus received was about fifteen hundred dollars. After withdrawing his resignation as Judge of Probate, he entered into a bargain with a local politician who had been a rival candidate for the office of Collector whereby he agreed to resign that office in return for a payment of about eighteen hundred dollars and a promise that his appointees should not be disturbed. These facts were established largely on Judge Day's own testimony. Indeed he contended that his action in this matter was neither illegal nor improper. In its report the committee said:

> The facts as they appeared to the Committee conclusively show that Joseph M. Day is not a fit person to be a judge of probate in Massachusetts. This Commonwealth has just cause to be proud of the character and the reputation of her judiciary. We are bound to see that its standard of excellence is maintained. Judge Day's conduct shows a continuing disregard of wholesome laws and violation of the rules of official propriety and decorum. He was not ignorant of the law. His actions were not the result of inadvertence. In two cases, at least, after the illegality and impropriety of his acts were called to his attention, he continued to act in utter disregard of law and decorum. . . . In view, then, of his repeated violations of law and propriety, and of the general character of the man as developed by the testimony, and more especially in view of the important and almost sacred duties which devolve upon a judge of probate as the guardian and protector of the widow and the fatherless, we favor his removal from the office which he holds.

Appended to the report was a draft of an address to Governor Long asking him to remove Judge Day. No reasons

were assigned in the address for the action which it requested. By a vote of 131 to 54 in the House and of 25 to 4 in the Senate, the address was adopted, and on May 26, 1882, Judge Day was removed by Governor Long.[1]

IX. Impeachment v. Removal by Address.

If the process of removal by impeachment be compared with removal by address, certain distinctions at once appear. The following are obvious:

1. The process of impeachment is not restricted to judges, while no officers other than judges may be removed by address. This distinction is easily traceable to the necessity that judges shall be above suspicion and to the fact that because of the nature of their duties judges, though guilty of no crime, might so forfeit public confidence as to become useless.

2. An officer may be impeached in Massachusetts only for misconduct and maladministration in office, but the Constitution does not specify the causes upon which removal by address may be based.

3. Removal by impeachment is a judicial process. It involves a trial, specific charges, an opportunity for a hearing, the introduction of evidence, and the finding of a verdict. Removal by address may be effected without formal charges or a hearing or any determination of guilt. In fact, it may be that no question of guilt, either legal or moral, is involved.

4. Conviction after impeachment may involve not only loss of office but disqualification ever to hold any public position of trust or profit again. Procedure by address involves no other penalty than removal.

5. The distinction between impeachment and removal by address is further marked in the Constitution of Massachusetts by the provision that any officer who is removed by impeachment shall still be subject to indictment and punishment according to the laws of the land. As removal by address is not a judicial proceeding no such provision is necessary in that case.

[1] Judge Day has been rescued from oblivion not only by the method of his removal from office but also by his contesting the right of the Federal Government to levy an income tax upon the salary which he received as a judge of a Massachusetts court. He sued to recover the tax which he had paid under protest, and in The Collector *v.* Day (1870), 11 Wallace, 113, the United States Supreme Court held that the salary of a State officer is not subject to a Federal tax.

Growing out of these differences is the important question which has been mooted on several occasions as to the power of the legislature in a given case to choose at will whether it will proceed by impeachment or by address. It has been strenuously insisted at times that the General Court does not have such a choice. It has been argued that the two methods of procedure are not interchangeable, but that they are designed to meet two distinct classes of cases. In the one category should be placed "high crimes and misdemeanors" as they are called in the Constitution of the United States, or "misconduct and maladministration in their offices" as it is phrased in the Constitution of Massachusetts. In the other category should be placed cases of mental and physical incapacity and also that large and indefinable class of cases where removal is justified by considerations of public policy. Those who hold this view argue that if the offence charged is an indictable one the General Court must proceed by impeachment, while of course it is unquestioned that if the reason for removal is mental or physical incapacity, or is purely one of public policy, the correct procedure is by address. In the history of Massachusetts the General Court has not in practice conformed to these distinctions. Of the five Justices of the Peace who were removed for their connection with Shay's Rebellion, two were under indictment for treason and the others were subject to such indictment, yet the General Court proceeded by address. John Vinal had already been convicted of an indictable offence and he was removed by impeachment. Three years later, however, in the cases of Sargent and William Vinal, which were precisely the same in their facts as the case of John Vinal, the General Court, after formulating articles of impeachment, abandoned that method and proceeded by address. And again in 1876 the three magistrates who were then in prison or fugitives from justice were removed by address. It is obvious that the cases of Justice Bradbury and Judge Loring offered no ground for impeachment, but it would seem that the facts in the cases of Judge Prescott and Judge Day were of such a mixed nature that the General Court would have been justified in choosing either method. Some of the charges brought in those cases would have warranted impeachment, while the questionable

thriftiness of Judge Prescott and the unjudicial temperament of Judge Day would have warranted their removal by address.

The issue was clearly raised in the cases of Sargent and William Vinal. While those cases were pending the following report was submitted to the Senate:

The Committee to whom were referred the Report of an Address to his Excellency the Governor, for the removal of Paul Dudley Sargent, and William Vinall from the Offices they sustain, of Justices of the Court of Common Pleas, & Justices of the Peace for the County of Hancock; and also the memorial of sundry Inhabitants of said County, and the petition of Daniel Sargent against the removal of said persons without trial, —

Respectfully Report —

That the various views they have taken of this subject, constrain them to declare as their opinion, that it would more comport with the Justice, as well as the Dignity of the House of Representatives, and the general welfare of the community, to proceed by impeachment of the said Paul Dudley Sargent, and William Vinal, and to prosecute their Trial before the High Court of the Senate, than to concur in the proposed address to the Governor, to remove said persons without trial. The Committee found their opinion, on the following Reasons —

First. A respect to the Judgment of a former House of Representatives, before whom the very charges on which the conviction of a Jury was founded, were solemnly investigated, and not found worthy of further proceedings.

Secondly. The offences alledged are official offences, and against the whole Commonwealth. The opinion of a local Jury, ought not in such a case to be final, or the ground of an address to remove without examination, more especially under the circumstances of the previous enquiry by a former House of Representatives. Local Juries, from many circumstances are liable to the passions of partiality and of prejudice. These qualities too often bias and obscure the Judgment. Were the offences inebriety, or any other self debasing vice, a conviction by a Petit Jury, ought probably to operate as a proper foundation for an address, to remove without further Trial: and it may be presumed that the Constitution contemplated these offences, as one basis of an address, to remove without further Trial. —

Thirdly. The danger of the Precedent.

If removal should be obtained in the present case, of members of the Judiciary, without any Trial in the highest Court, serious apprehensions may be entertained, that a political difference of opinion, between the Legislature, and some of the brightest ornaments of the Judiciary, might at some future time be made the mean of stigmatising, if not removing the latter.

Your committee conceive that the expense incident to an impeachment

and trial before the Senate, is too unimportant to be entitled to any weight, when contrasted with the great evil of an improper preceedent.

Your committee are most deeply impressed, with the importance of preserving perfectly pure, the administration of Justice, and they are of opinion, that the fair and elevated principle, *that trial ought to preceed condemnation*, is involved in that idea, and is paramount, to all other considerations. All which is submitted —

H Knox per
Order.[1]

John Quincy Adams also filed a protest in which he set forth the following reasons in favor of proceeding by impeachment rather than by address:

The Subscriber requests that the following reasons for his dissent from the vote of the Senate to accept the report of the Committee for addressing His Excellency the Governor to remove Paul Dudley Sargeant and William Vinall from the Offices of Justices of the Courts of Sessions and of Common Pleas for the Counties of Hancock and Washington, may be entered upon the Journals of the Senate.

First. Because the grounds alledged in the said address for the removal are for official misdemeanors; and the subscriber conceives it to be the intention of the Constitution, that no Judicial Officer should be removed from Office, by the mode of an Address of the two houses, on the ground of offences, for the trial of which the Constitution has expressly provided the mode of Impeachment.

Secondly. Because he considers the Independence of the Judiciary, as materially affected, by a mode of proceeding which in its effects must make the tenure of all Judicial Offices dependent upon the verdict of a Jury in any one county of the Commonwealth.

Thirdly. Because the decision of the Senate in this case, affecting in the highest degree, the *rights*, the *character* and *reputation* of two individual citizens of this Commonwealth, ought not to have been taken, without giving them an opportunity previously to be heard in their own defence.

John Quincy Adams.

The foregoing reasons were entered on the Journals of Senate, by the leave thereof obtained March 4th. 1803.[2]

As against the views here expressed by John Quincy Adams, it may be suggested that in such cases as those of Sargent and Vinal the doctrine of *res adjudicata* might well be applied. If

[1] Massachusetts Archives, *Senate Files, No. 2935* (7).
[2] Massachusetts Archives, *Senate Files, No. 2935* (4).

the guilt of the accused has already been judicially established, should the question be re-opened in a court of impeachment? Trial before the Senate implies always the possibility of acquittal. Had the General Court in the cases of Sargent and Vinal proceeded by impeachment, it is not impossible that a political body like the Senate would not reach the same conclusion as the Supreme Judicial Court. It is obvious that while the Senate, when sitting for a trial of impeachment, is called a court and is performing a judicial function, it is unlike any other court that our system of government knows. It may not contain a single lawyer in its membership. It may disregard all the established rules of evidence by which other tribunals are bound. It is not at all impossible that such a body as the Senate, in which considerations of policy may fairly have weight, might acquit an officer who had already been convicted. In such a case we would have the undesirable situation of a public officer pronounced guilty and perhaps held in prison by one tribunal while another declares him innocent and entitled to exercise his official functions. If the General Court proceeds by address to bring about the removal of a judge who has already been convicted of crime, it does not by such procedure pronounce in any way upon his guilt or innocence, but only indicates its opinion that because of such conviction he should be removed from his office. But if in such a case the General Court proceeds by impeachment, it institutes a judicial proceeding in which the question of guilt or innocence is again brought into issue. It would, therefore, seem well to allow the General Court, in cases where an officer's guilt has once been judicially determined, to accept that result as sufficiently established to justify his removal by an address to the Governor.

In the Constitutional Convention of 1820 the removal of judges by address was carefully considered, and several of the most eminent members expressed great alarm that so unrestrained a power over the judiciary should be vested in the General Court. The Committee on the Judiciary, of which Joseph Story was chairman, said in its report:

> By the first article of the constitution, any judge may be removed from his office by the governor, with the advice of the council, upon the address of a bare majority of both houses of the Legislature — the committee are

of opinion that this provision has a tendency materially to impair the independence of the judges, and to destroy the efficacy of the clause which declares they shall hold their offices during good behavior. The tenure of good behavior seems to the committee indispensable to guard judges on the one hand from the effects of sudden resentments and temporary prejudices, entertained by the people, and on the other hand, from the influence, which ambitious and powerful men naturally exert over those who are dependent upon their good will. A provision which should at once secure to the people a power of removal in cases of palpable misconduct or incapacity, and at the same time secure to the judges a reasonable permanency in their offices seems of the greatest utility; and such a provision will in the opinion of the committee be obtained by requiring that the removal, instead of being upon the address of a *majority*, shall be upon the address of *two thirds* of the members present of each house of the Legislature. And this provision has the additional recommendation that it is engrafted into the constitution of some of the other states, and exists in analogous cases in the constitution of the United States.

The discussion of this recommendation of the committee made it clear that there was a wide-spread desire to impose some restraint on the General Court although it was admitted that there had been no example of abuse of its power. In the debates Daniel Webster said:

As the constitution now stands, all judges are liable to be removed from office by the governor, with the consent of the council, on the address of the two houses of the Legislature. It is not made necessary that the two houses should give any reasons for their address, or that the judge should have an opportunity to be heard. I look upon this as against common right, as well as repugnant to the general principles of the government. The commission of the judge purports to be, on the face of it, during good behavior. He has an interest in his office. To give an authority to the Legislature to deprive him of this, without trial or accusation, is manifestly to place the judges at the pleasure of the Legislature. The question is not what the Legislature probably will do, but what they may do. If the judges, in fact, hold their offices only so long as the Legislatures see fit, then it is vain and illusory to say that the judges are independent men, incapable of being influenced by hope or by fear; but the tenure of their office is not independent. The general theory and principle of the government is broken in upon, by giving the Legislature this power. The departments of government are not equal, co-ordinate and independent, while one is thus at the mercy of the others. What would be said of a proposition to authorize the governor or judges to remove a senator or member of the house of representatives from office? And yet the general theory of the constitution is to make the judges as independent as members of the Legislature. I know not whether a

greater improvement has been made in government than to separate the judiciary from the executive and legislative branches, and to provide for the decision of private rights, in a manner wholly uninfluenced by reasons of state, or considerations of party or of policy. It is the glory of the British constitution to have led in the establishment of this most important principle. It did not exist in England before the revolution of 1688, and its introduction has seemed to give a new character to the tribunals.

The fears which so many members expressed that the power vested in the General Court would be abused was best answered by one of the delegates, Lemuel Shaw, who had himself expressed such fears. Less than a year later, in the impeachment trial of Judge Prescott, he said:

The Legislature, without either allegation or proof, has but to pronounce the *sic volo, sic jubeo*, and the officer, is at once deprived of his place, and of all the rank, the powers and emoluments belonging to it. And yet perhaps, this provision, whether wise or not I will not now stop to consider, is hardly sufficient to justify the extraordinary alarm which has been so eloquently expressed for the liberty and security of the people, or to affix upon the constitution the charge of containing features more odious and oppressive than those of Turkish despotism. The truth is, that the security of our rights depends rather upon the general tenor and character than upon particular provisions of our constitution. The love of freedom and of justice — so deeply engraven upon the hearts of the people, and interwoven in the whole texture of our social institutions — a thorough and intelligent acquaintance with their rights — and a firm determination to maintain them — in short those moral and intellectual qualities, without which, social liberty cannot exist, and over which despotism can obtain no control — these stamp the character and give security to the rights of the free people of this Commonwealth. So long as such a character is maintained, no danger perhaps need be apprehended from the arbitrary course of proceeding, under the provision of the constitution, to which I have alluded.

The Convention of 1820, by a vote of 221 to 3, adopted a resolution providing for the following amendment:

Justices of the peace may be removed from office like other judicial officers, by the governor, with the consent of the council, upon the address of a majority of the members present of each house of the Legislature; but no address for the removal of any judicial officer shall pass either house of the Legislature until the causes of such removal are first stated and entered on the journal of the house in which it shall originate, and a copy thereof served on the person in office, so that he may be admitted to a hearing in his defence before each of said houses.

In the Convention's Address to the People this resolution was commended in the following terms:

An independent judiciary is a fundamental principle of a free government. We cannot so well express our sentiments on this important subject, as by referring to the twenty-ninth article of the declaration of rights.

It is there said, "It is the right of every citizen to be tried by judges as free, impartial, and independent, as the lot of humanity will admit:" and therefore, "that judges should hold their offices as long as they behave themselves well."

The judges have not such tenure of office, unless the constitution be understood to mean, that they are not liable to removal until they have had an opportunity to show that the alleged causes for removal are unfounded, or insufficient. The Legislature, in removing a judge, exercises not only a discretionary, but a judicial power. Judgment cannot justly be given, in any case affecting any interest, even of the humblest citizen, unless the cause has been first stated, and it has been permitted to him to show, what he considers to be the truth of his case.

It cannot, then, be consistent with the plainest principles of justice, that the public functions of a citizen and perhaps his reputation, may be taken from him, without any other notice from those who may exercise such power, than that they have exercised it, and that his relation to the public has ceased.

In whatever estimation we may hold the rights and interests of any individual who sustains a high judicial office, it is rather the public right and interest, which move us to propose the subjoined amendment.

The people can have no dearer interest in anything pertaining to government, than in the interpretation of the laws, and in the administration of justice, affecting life, liberty, property, and character. The constitution, with the explanatory amendment which we propose, secures to the people the unquestionable right of removing the unfit, the unworthy, and the corrupt; while it secures to them the no less valuable right of preserving to themselves, the able, the upright, and the independent magistrate.

We propose, therefore, so to amend the constitution as to require that no judicial officer shall be removed from office, until the alleged causes of removal are stated on the records of the Legislature, nor until the individual, thereby affected, shall have had an opportunity to be heard.

On reference to the people this proposal of amendment was defeated by a vote of 12,471 to 14,513 and the General Court was therefore left in possession of the unlimited power with which it was vested in 1780.

A valuable contribution to the discussion of the subject of the circumstances which justify removal by address was made

in connection with an address sent to Queen Victoria from Australia. In 1861 Justice Boothby of the Supreme Court of South Australia questioned the validity of an act of the Legislature of that colony, whereupon the law-makers, after the fashion of those of Rhode Island who refused to reappoint the judges who in Trevett *v.* Weeden had pronounced one of their measures unconstitutional, united in addresses to the Queen asking for his removal. The reply of the Colonial Secretary, the Duke of Newcastle, derives additional importance from the fact that it was based upon the opinion of the Law Officers of the Crown, Sir William Atherton and Sir Roundell Palmer. In discussing the grounds for removal of a judge upon parliamentary address, His Grace intimated that such a step could be justified by proof "that owing to his perversity, or habitual disregard of judicial propriety, the administration of justice might be practically obstructed by his continuance in office." Such a result might be evidenced "by his inflexible enforcement of opinions which were inconsistent with the beneficial performance of his duties," and which were held by competent authority to be "incorrect in point of law."[1] With this last statement should be compared the opinion expressed by Chief Justice Shaw in his argument at the impeachment of Judge Prescott:

> By the constitution, which is a law of the highest nature, every officer is bound to take an oath faithfully and impartially to perform and discharge all the duties incumbent on him as such officer, according to the best of his abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of this Commonwealth. To perform these duties faithfully and impartially, he must understand them, and he must use due diligence to acquaint himself with them. I should therefore hold that any gross and continued neglect of the ordinary means of information, as if an officer were to disregard those public statutes which are made from time to time, and the knowledge of which would be necessary to the intelligent and proper discharge of the duties of his office, or if the judge of an inferior court should wilfully neglect to inform himself of those adjudications of superior courts, which as precedents ought to bind and govern him; or in any way should wilfully neglect the means of qualifying himself for the faithful and intelligent performance of his duties, such neglect would be misconduct punishable by impeachment.

[1] Correspondence relative to Mr. Justice Boothby, *Commons Papers, 1862*, XXXVII, 180 *seq.*

The conflict between the views expressed by the Colonial Secretary of Great Britain in 1861 and those expressed by Lemuel Shaw forty years earlier is not more marked than is the variance of practice of the General Court in the cases in which it has acted. Whatever may be the theory, in practice the question as to whether the General Court shall proceed against an obnoxious judge by impeachment or address must be left to the sound discretion of that body upon which the Constitution places the responsibility for decision.

NOTE. — Since the preparation of the foregoing account, the Constitutional Convention of Massachusetts submitted to the people the following amendment concerning the removal of judges and it was adopted November 5, 1918:

Article I of Chapter III of Part the Second of the constitution is hereby amended by the addition of the following words: — and provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement.

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BULLETIN No. 37

REPORT OF THE COMMISSION TO COMPILE INFORMATION AND DATA FOR THE USE OF THE CONSTITUTIONAL CONVENTION

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MESSAGE OF HIS EXCELLENCY THE GOVERNOR AND THE ACTION OF THE CONVENTION THEREON.

THE COMMONWEALTH OF MASSACHUSETTS,
EXECUTIVE DEPARTMENT, STATE HOUSE,
BOSTON, August 17, 1918.

Hon. JOHN L. BATES, *President Constitutional Convention, Boston, Mass.*

MY DEAR MR. BATES: — I am handing you herewith the report of the Commission to Compile Information and Data for the Use of the Constitutional Convention that has been made to me. I cannot express too strongly my appreciation of the very efficient work of this Commission. It has been notably good, and has been completed within the limits of the small appropriation set aside for it. I am transmitting it to you for such action as the Constitutional Convention may wish to take on it.

Yours very truly,

SAMUEL W. McCALL.

IN CONVENTION, TUESDAY, August 20, 1918.

A communication from His Excellency the Governor, transmitting a report of the Commission appointed, under chapter 28 of the General Acts of the year 1917, to compile information and data for the use of the Convention, was read.

On motion of Mr. Luce of Waltham the communication and report were referred to a special committee of three members to be appointed by the President.

IN CONVENTION, WEDNESDAY, August 21, 1918.

The President appointed Messrs. Luce of Waltham, Sherburne of West Springfield and Kerr of Malden the special committee of three members to consider the communication from His Ex-

cellency the Governor transmitting a report of the Commission appointed, under chapter 28 of the General Acts of the year 1917, to compile information and data for the use of the Convention.

Subsequently (Mr. Kinney of Boston being in the chair) Mr. Luce of Waltham, for the special committee, reported recommending the adoption of the following order: —

Whereas, The work of the Commission appointed to compile information and data for the use of the Convention not only has been of material help to the Convention, but also, in our judgment, is a valuable contribution to the literature of political science; therefore be it

Ordered, That a record be made of our appreciation of the worth of this work, as well as of the assiduous labors of the members of the Commission, William B. Munro, Lawrence B. Evans and Roger Sherman Hoar; and

Ordered, That the report of the Commission and the message of the Governor transmitting it to the Convention be published as the final number of the Commission's bulletins, and that five hundred copies be printed for the use of the Convention.

On motion of Mr. Luce the provision of the standing order requiring the order to be referred to the committee on Rules and Procedure was suspended; and the order was then adopted.

REPORT OF THE COMMISSION TO COMPILE INFORMATION AND DATA FOR THE USE OF THE CONSTITUTIONAL CONVENTION.

To His Excellency the Governor:

The Commission appointed under the provisions of chapter 28 of the General Acts of 1917 to "compile and render accessible, in convenient form and arrangement, such information, data and material as may aid the Convention in the discharge of its duties", submits the following report: —

1. Organization of the Commission.

The Commission, composed of William B. Munro of Boston, chairman, Lawrence B. Evans of Medford, and Roger Sherman Hoar of Concord, duly qualified on March 1. Henry Ward Bird of Boston was appointed secretary, and Lawrence B. Evans was named vice-chairman and was given executive direction of the work of the Commission. Offices were provided for the Commission in rooms 425 and 426 in the East Wing of the State House.

2. General Scope of the Commission's Work.

A few general rules were at the outset agreed upon by the Commission to guide it in its work, particularly in view of the limited time and money at its disposal. These rules may be briefly stated as follows: —

(*a*) That an endeavor be made to find out the specific subjects likely to be dealt with by the Convention, so far as these could with any probability be ascertained in advance, and that attention be concentrated upon such subjects.

(*b*) That so far as practicable only data of an official character should be compiled, that information should deal only with matters of fact, and that this information should be transmitted to the delegates without any

comment or expression of opinion. The members of the Commission believed it to be impracticable to attempt any summary of the arguments pro and con, as respects controverted subjects, without serious danger of appearing to display a bias toward one side or the other.

(*c*) That a series of bulletins should be published dealing with the most important subjects which were likely to concern the Convention. Each bulletin should be devoted to one topic only, and should present impartially and in concise form the most authoritative information obtainable on the subject treated. In each there should be a short bibliography or list of references to further information.

3. Inquiries as to Subjects.

Shortly after its appointment the Commission sent to all those persons, about nine hundred in number, who had taken out nomination papers for election to the Convention, and to a list of organizations throughout the State, a circular request for suggestions as to the topics upon which information ought to be compiled. A large number of replies were received, and from these replies, after eliminating duplicate suggestions, a general list of about one hundred subjects was arranged. This list in alphabetical order is as follows: —

Absentee Voting.
Administrative Boards and Provisional Orders (English system).
Admission to the Bar.
Amendment of Constitutions, Methods of.
Appointments, Approval of Governor's.
Appropriation Bills, Veto of Items in.
Biennial Elections.
Biennial Sessions.
Billboards, Regulation of.
Bond Issues, Referendum on.
Boston, Government of Metropolitan District of.
Budget Systems.
Capital Punishment, Abolition of.
Census, State.
Challenging of Judges.
City Managers.
City Planning Boards.
Civil Service Regulation.
Codification of Constitutions.
Commission Government for Cities.
Committees of the Legislature, Methods of Choosing.
Compulsory Voting.

Constitutional History of Massachusetts.
Contempt Proceedings, Jury Trial in.
Contested Election Cases.
Corporate Franchises, Limitation of.
Corrupt Practices Legislation.
Council (Governor's), Abolition of.
County Government in Massachusetts.
Debt Limit, Municipal.
Debt Limit, State.
Debts, — Methods of Borrowing — Sinking Fund *v.* Serial Bonds.
Educational Qualifications for Voting.
Elections, — Results of Non-partisan Election Law in Minnesota (1912).
Excess Condemnation.
Executive Recommendations, Right of Way for.
Exemption of Property from Taxation.
Food and Fuel, Sale of, by Municipalities.
Franchises, Taxation of.
Health Insurance.
Homestead Law, Working of.
House of Representatives, Reduction in Size of.
Industrial Arbitration.
Initiative and Referendum.
Judicial Procedure, Simplification of.
Judiciary Administration.
Judiciary, Elective.
Jury Trials in Equity Cases.
Juvenile Courts.
Legislative Sessions, Limitations on.
Limitations upon the Taxing Power.
Military Training, Compulsory.
Militia, Constitutional Provisions Concerning.
Minority Representation.
Mothers' Pensions.
Municipal Affairs, State Board of.
Municipal Codes of England, France and Germany.
Municipal Home Rule.
Municipal Ownership.
New Zealand, Government of.
Old Age Pensions.
Pardoning Power.
Police Power of the Legislature.
Preferential Voting.
President of the Senate, Election and Powers of.
Procedure of Constitutional Conventions.
Prohibition.
Proportional Representation.

"Proportional" Taxation.
Public Administrators.
Public Defenders.
Public Opinion Act, Working of.
Public Utilities, Regulation of.
Recall of Elective Officials.
Recall of Judges.
Recall of Judicial Decisions.
Representation, Basis of.
Sectarian Appropriations.
Senate, Abolition of.
Short Ballot.
Single Tax.
Social Welfare Legislation.
Speaker of the House, Election and Powers of.
Special Assessments.
State Constabulary.
Suffrage:
  Educational Qualifications.
  Minority Representation.
  Preferential Voting.
  Short Ballot.
  Tax and Property Qualifications.
  Woman Suffrage.
Sunday Laws.
Switzerland, Government of.
Tax and Property Qualifications for Voting.
Taxation:
  Classification.
  Income Tax.
  "Proportional."
  Single Tax.
  Special Assessment for Betterments.
  Taxing Power, Limitations upon the.
Taxation, Local Option in.
Taxation of Land Values in British Empire, Germany and United States.
Unemployment, Insurance against.
Veto of Items in Bills other than Appropriation Bills.
Veto System of Alabama.
Voting:
  Absentee.
  Compulsory.
  Educational Qualifications.
  Tax and Property Qualifications.
Woman Suffrage.

4. Collection of Data.

On all of the above-mentioned subjects information was brought together by the Commission. Some of it was sent in printed form to the delegates before the Convention began its sessions and all of it was in readiness when the various committees of the Convention held their hearings. This was accomplished in spite of the fact that in many cases the gathering of these data necessitated the sending of inquiries to State officials in all parts of the country and even to officials in foreign lands, with consequent delays at many points. Likewise, owing to the number and technical nature of the topics and in view of the brief period of time available, the Commission had to depend to an extent upon outside assistants, all of whom helped to gather and arrange the information for a merely nominal compensation, or in some cases without compensation at all. It should be understood, however, that all the data compiled by these assistants received the personal supervision and scrutiny of the Commission. In several instances the monographs which were received from them were almost entirely rewritten before they were submitted to the Convention. It may also be added that Bulletin No. 21 was written by Mr. Munro and that Bulletins Nos. 1, 9, 17, 20, 23, 25, 33, 34, 35 and 36 were written by Mr. Evans.

5. Publications for the Delegates.

Through the courtesy of various members of the General Court, the Commission secured for each delegate to the Convention a copy of the Manual for the General Court (1917), containing the data which are annually placed at the disposal of Senators and Representatives, including the rules of the two houses, the joint rules and the rulings made upon these rules by the presiding officers.

The following publications have been prepared by the Commission especially for the Convention: —

(*a*) A short list of references to general books dealing with constitutions, constitutional conventions and State government.

(*b*) A list of the subjects upon which data have been collected

or were in process of collection by the Commission for the Convention's use.

(*c*) A copy of the present Constitution of Massachusetts printed *verbatim et literatim* from the original parchment in the office of the Secretary of the Commonwealth. This copy is of convenient vest-pocket size, bound in limp leather, with a full index and containing blank pages for daily memoranda. This is the only literal reproduction of the Constitution issued under the authority of the Commonwealth. This same text is printed in the Manual.

(*d*) A Manual for the Constitutional Convention. This volume contains a sketch of the constitutional history of Massachusetts; the Constitution of the United States; an annotated edition of the existing Constitution of the Commonwealth giving under its various sections the appropriate references to the Opinions of the Justices or to the decisions of the Supreme Judicial Court in interpretation thereof; a summary of the present administrative organization of the Massachusetts government; a tabular view of the organization of government in the other States of the Union; the rules of procedure adopted by former constitutional conventions in Massachusetts, the act providing for the calling of the present Convention (chapter 98, General Acts of 1916), the Governor's proclamation, a list of the delegates elected to the Convention, and various other data. The Convention ordered a second edition of the Manual to be printed, and in this edition are included the rules of the Convention, a list of its officers and the committee assignments of its members.

(*e*) Bulletins upon the following subjects: —

1. The Procedure of Constitutional Conventions.
2. State Budget Systems in the United States.
3. The Abolition of the Governor's Council.
4. The Pardoning Power.
5. A Summary of Existing Laws on Old Age Pension Systems.
6. The Initiative and Referendum.
7. The Public Opinion Law of Massachusetts.
8. County Government in Massachusetts.
9. Biennial Elections and Sessions of the Legislature.
10. The Short Ballot.
11. Municipal Home Rule.

12. Commission Government in American Cities.
13. The City-Manager Plan of Municipal Government.
14. Constitutional Restrictions on Municipal Indebtedness.
15. Constitutional Restrictions on State Debts.
16. The Selection and Retirement of Judges.
17. Appropriations for Sectarian and Private Purposes.
18. The Constitutionality of Social Welfare Legislation.
19. Excess Condemnation.
20. Classification of Property for Purposes of Taxation.
21. Methods of Borrowing — Sinking Funds *v.* Serial Bonds.
22. Municipal Ownership.
23. Absent Voting.
24. Compulsory Voting.
25. The Abolition of Capital Punishment.
26. The Recall of Officers.
27. Preferential Voting.
28. Proportional Representation.
29. The Basis of Apportionment in the Several States.
30. The English System of Provisional Orders.
31. The Regulation of Billboards.
32. The Regulation of the Liquor Traffic.
33. Woman Suffrage in the United States.
34. Special Legislation.
35. The Revision and Amendment of State Constitutions.
36. The Removal of Judges in Massachusetts.

An edition of five hundred copies of each Bulletin was printed. In several instances this proved to be insufficient to meet the needs of committees and delegates, and the Convention thereupon ordered a second edition to be printed. The Convention also voted that the Bulletins be published in permanent form. They will be issued in two volumes uniform in style with the Convention Debates.

(*f*) By order of the Convention the following compilations, prepared by the Commission, were printed as Convention Documents: —

1. The Constitution of Massachusetts tentatively arranged in Codified Form.
2. The History of the Movement for Biennials in Massachusetts. The substance of this was incorporated in the revised edition of Bulletin No. 9.
3. Statutory Powers and Duties of the Governor and Council. In the permanent edition of the Bulletins, this will appear as a supplement to Bulletin No. 3.

6. Unpublished data.

On many topics which were suggested as being of interest to some delegates but not of general importance, the Commission had information compiled and made accessible in typewritten form. In each case four copies were available for the use of delegates or committees. A list of these typewritten studies, which have been left on file in the State Library, is as follows:—

1. Appropriation of Public Funds for Sectarian Purposes, and the Interpretation of the Word "Sectarian."
2. Constitutional Amendments Submitted in 1853 and the Vote thereon.
3. Contested Elections.
4. Corrupt Practices Legislation.
5. Digest of Legislative Enactments for Absent Voting by Electors in Military Service.
6. Experiments in the Direction of the Single Tax.
7. Educational Qualifications for the Suffrage.
8. Federative City Government as Exemplified by New York and London.
9. The Formation of Corporations under General Laws.
10. Industrial Conciliation and Arbitration.
11. Juvenile Courts.
12. Methods of Appointing Legislative Committees.
13. Methods of Codifying the Constitution.
14. The Militia System of Massachusetts.
15. The Minnesota Non-partisan Election Law.
16. Municipal Ordinances Restricting the Use of Land.
17. Printing of Convention Debates.
18. Public Trustees.
19. State Constabularies.
20. Statistical View of Massachusetts Conventions.
21. Tax and Property Qualifications for the Suffrage.
22. Tax Exemption in Massachusetts.
23. Tie Votes.

7. Collections of Books, Reports, Pamphlets and Works of Reference.

In accordance with the provisions of the act authorizing its appointment the Commission arranged to have placed upon the shelves in the Legislative Reference Rooms of the State Library a selection of the books, reports, pamphlets, magazine articles

and general works of reference covering all the more important subjects coming before the Convention. Additional material was added as the discussions developed. The location of these shelves was chosen because of their proximity to the general collections of data in the State Library and their ready accessibility to members of the Convention.

8. Other Work of the Commission.

In addition to its work of preparing data, the members of the Commission were able to render various other services to the Convention. Many of the proposals of amendment which were presented by the delegates were drafted for them and at their request by members of the Commission. The Vice-chairman of the Commission was appointed Technical Adviser to Committees and was retained as a permanent officer of the Convention. For individual delegates a great many specific points were investigated from time to time. Finally, the Commission's clerical staff was called upon to do considerable work in the way of typewriting and copying for committees of the Convention and for individual delegates.

9. Conclusion.

The Commission desires to acknowledge with appreciation and gratitude the assistance given to it in its work by the many State and municipal officials to whom it has sent inquiries. It is especially indebted to the Secretaries of State and the Attorneys-General of the several States. It would also mention the aid which it received from Honorable Elihu Root, President of the New York Constitutional Convention of 1915; from Honorable Morgan J. O'Brien and Honorable Samson Lachman, members of the New York State Constitutional Convention Commission; from the late Charles E. Burbank, under whose direction the Summary of the Organization of the Executive Branch of the Government of Massachusetts, which was printed in the Manual, was prepared; from Honorable Courtenay Crocker and Philip Mansfield, Esq., both of the Boston Bar, who assisted in the preparation of the annotated edition of the

Constitution of Massachusetts, also printed in the Manual; and from the following organizations and persons who compiled data, made investigations and performed other service under the direction of the Commission: American Telephone and Telegraph Company; Professor William Anderson, University of Minnesota; Honorable Henry C. Attwill, Attorney-General of Massachusetts; Francis R. Bangs, Esq.; Dr. Cesar Barja, Madrid; James W. Bell, Esq.; Boston Finance Commission; Miss Bernice Brown; Frederick D. Colson, Clerk of the New York Court of Claims; Professor Edwin A. Cottrell, Ohio State University; F. Winchester Denio, Esq.; John L. C. Dowling, Counsel to the Boston Finance Commission; Professor Leon Dupriez, University of Louvain; Lee M. Friedman, Esq.; Gaston, Snow & Saltonstall; Charles F. Gettemy, Director of the Bureau of Statistics; H. S. Gilbertson, Secretary of the National Short Ballot Association; Frank W. Grinnell, Secretary of the Massachusetts Bar Association; A. Chester Hanford, Esq.; William E. Hannan, Legislative Reference Librarian of New York; Herbert Harley, Secretary of the American Judicature Society; Harvard Library; Professor George H. Haynes, Worcester Polytechnic Institute; Honorable Charles Henderson, Governor of Alabama; Morton D. Hull, Esq., Chicago; Reginald M. Hull, Esq.; Ex-Governor William D. Jelk, Birmingham, Alabama; Professor Albert M. Kales, Harvard Law School; John Koren, Esq.; Dr. Arnold J. Lien, University of Colorado; Honorable Robert Luce; William S. Maulsby, Esq.; Dr. Samuel Eliot Morison; Guy C. Newhall, Esq.; Ex-Governor E. F. Noel, Mississippi; Henry D. Nunn, Esq.; Harrison G. Otis, City Manager of Auburn, Maine; Commodore James P. Parker, Massachusetts Naval Militia; Thomas I. Parkinson, Legislative Drafting Bureau, Columbia University; Roswell F. Phelps, Massachusetts Bureau of Statistics; E. H. Redstone, Librarian of Social Law Library; Robert G. Richards, Esq; Flavel Shurtleff, Esq.; Foster W. Stearns, State Librarian of Massachusetts, and the staff of the Massachusetts State Library; Howard H. Tewksbury, Esq. Theodore N. Wardell, Massachusetts Bureau of Statistics; Miss Isabel Wardner; Harry S. Warren, Esq.; Arthur Will-

iams, Esq.; and Dr. James I. Wyer, Jr., Director of the New York State Library.

In conclusion the Commission would express its obligation to His Excellency the Governor and the Honorable Council for making financial provision for printing the information which the Commission compiled.

For the Commission,

LAWRENCE B. EVANS,
Vice-Chairman.

Boston, August 13, 1918.

Appendix.

THE ACT CREATING THE COMMISSION.

General Acts of 1917, Chapter 28.

An Act to provide for the Appointment of a Commission to Compile Information and Data for the Use of the Constitutional Convention.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. For the purpose of facilitating the work of the convention to revise, alter or amend the constitution of the commonwealth, as provided by chapter ninety-eight of the General Acts of the year nineteen hundred and sixteen, a commission of three learned and discreet persons shall be appointed by the governor, one of whom shall be designated as chairman, who shall forthwith proceed to compile and render accessible, in convenient form and arrangement, such information, data and material as may aid the convention in the discharge of its duties. The members of the commission may receive such compensation and may incur such expense for clerical assistance, incidentals and printing as the governor and council may approve, not to exceed in all the sum of ten thousand dollars. The governor is also empowered to fill any vacancy that may occur in said commission. The provisions of the laws relating to civil service shall not apply to clerks appointed by the commission.

Section 2. The commission shall place at the disposal of the members of said convention as soon as may be after their election the aforesaid information and data, from time to time, as the same is prepared and compiled and may, with the approval of the governor, distribute to such members before or after the organization of the convention as much thereof as the governor may authorize to be printed. The governor and council, upon such terms and conditions as they may deem expedient, may order that any material ordered printed for the use of said members shall be printed in sufficient quantity and distributed by the secretary of the commonwealth to the people at large.

Section 3. The commission shall be provided with suitable accommodations in the state house and shall, together with the members of the convention and the officers and employees thereof, have the same right of access to the state library as the members of the general court. There shall also be provided in the state house, subject to the approval of the

governor and council, a room or rooms conveniently near the place of meeting of the convention where the aforesaid information and data may be suitably arranged, indexed and catalogued.

SECTION 4. The service of said commission shall terminate upon the final adjournment of the convention, or whenever at any time prior to such adjournment, the governor may determine that the purposes and objects of said commission have been accomplished.

SECTION 5. This act shall take effect upon its passage. [*Approved February 28, 1917.*

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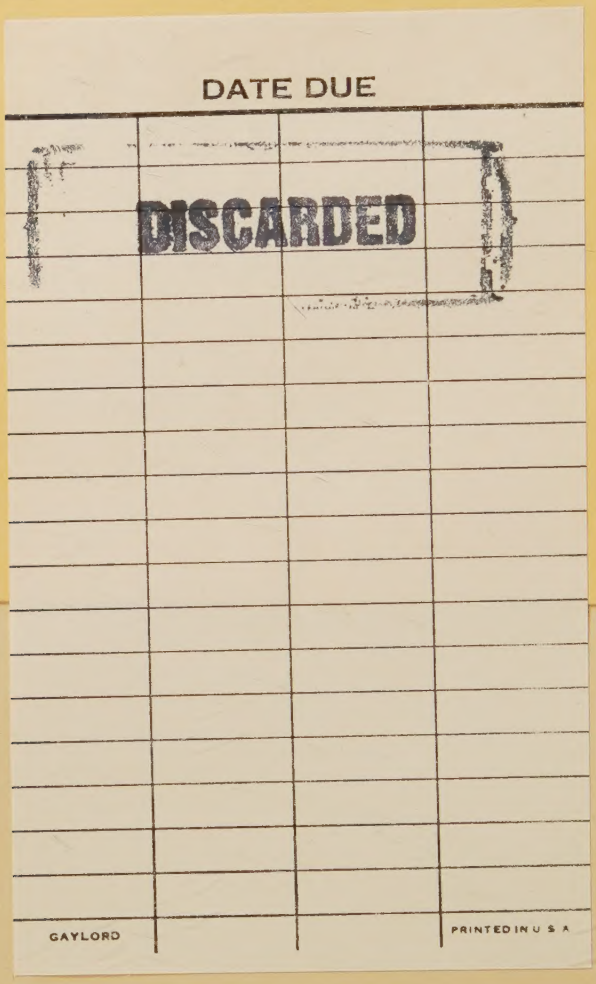

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